(16,580.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 15.

CHARLES COUDERT, AS ANCILLARY EXECUTOR OF THE LAST WILL AND TESTAMENT OF RAPHAEL MADRAZO, DECEASED, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 26, 1899.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The United States, plaintiff in error, and Charles Coudert, as ancillary executor of the last will and testament of Raphael Madrazo, deceased, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

b UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one to forty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of the United States, plaintiff in error, against Charles Coudert, as ancillary executor of the last will and testament of Rafael Madrazo, deceased, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern dis-

Seal United States Circuit Court of Appeals, Second Circuit.

trict of New York, in the second circuit, this twenty-third day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

JAMES C. REED, *Clerk.*

[Stamped:] United States circuit court of appeals, second circuit. Filed Apr. 1, 1897. James C. Reed, clerk.

c United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, Plaintiff in Error,
vs.
CHARLES COUDERT, as Ancillary Executor of Rafael Madrazo, Deceased, Defendant in Error.

Transcript of Record.

In error to the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Jun. 28, 1895. James C. Reed, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Charles Coudert, as ancillary executor of Rafael Madrazo, deceased, petitioner, plaintiff, and The United States of America, defendants, a manifest error hath happened to the great damage of the said The United States of America, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the second circuit, together with this writ, so that you may have the same at the city of New York on the 30th day of April, eighteen hundred and ninety-five, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the United States, the 4th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN A. SHIELDS, *Clerk.*

2 The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge,

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to thirty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause of The United States, plaintiff in error, against Charles Coudert, as ancillary executor of Rafael Madrazo, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the south-
[SEAL.] ern district of New York, in the second circuit, this second day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. circuit court of appeals for the second circuit. United States *vs.* Charles Coudert, as ancillary executor, &c. Writ of error. Wallace Macfarlane, United States attorney, attorney for U. S. A copy of the within paper has been this day received. N. Y., Apr. 4, 1895. Coudert Brothers, attorneys. To Coudert Brothers, attorneys for def't in error. U. S. circuit court. Filed Apr. 4, 1895. John A. Shields, clerk.

3 U. S. Circuit Court, Southern District of New York.

CHARLES COUDERT, Ancillary Executor of Rafael Madrazo, Deceased, Petitioner,
against
THE UNITED STATES OF AMERICA, Defendant.

The petition of the above-named Charles Coudert respectfully represents to the court and alleges in this behalf, on information and belief, as follows:

First. That on the 16th day of November, 1863, the Spanish bark "Teresita," together with her cargo, then the property of the above-named Rafael Madrazo, and while lying at anchor near the mouth of the Rio Grande river, in the gulf of Mexico, was captured by the United States steamer "Granite City," and brought to the port of

New Orleans for condemnation, for alleged violation of the blockade then held by the military and naval power of the United States over the entrance to the said river.

Second. That pending an adjudication of the question whether or not the said bark "Teresita" had so violated the blockade, the said bark and her cargo were sold by the United States marshal
4 for the eastern district of Louisiana, acting for and in behalf of the said United States, and the proceeds of such sale, after deducting costs, fees, commissions, and other charges, and thus leaving the sum of $10,359.20, was, pursuant to a regulation of the Treasury Department of the United States then in force, deposited by the said marshal in the First National Bank of New Orleans, Louisiana, then a special or designated depositary of public moneys of the United States.

Third. That such proceedings were thereafter had with respect to the said capture in the district court of the United States for the eastern district of Louisiana, before which the said cause was brought by the United States, that the said district court pronounced its judgment or decree declaring the said capture unlawful, and therefore directed restitution of the said vessel and cargo to her said owner, by virtue of which the said Rafael Madrazo became entitled to receive from the said United States the said deposit, as representing and standing in the place and stead of the said vessel and cargo.

Fourth. That notwithstanding the said decision and judgment of the said district court, the said United States, acting through its agents, attorneys and servants, appealed therefrom to the Supreme Court of the United States, and caused a supersedeas or stay of execution of the said judgment or decree to be issued and effected, pending the hearing of the said appeal by the said Supreme Court of the United States.

Fifth. That pending the said appeal to the said the Supreme Court of the United States, the said The First National Bank of New Orleans, in which the said proceeds were deposited as aforesaid, became insolvent, stopped payment on all its obligations and was placed in the hands of a receiver, pursuant to the statute of the United States in such case made and provided.

5 Sixth. That thereafter the said cause came on for hearing in the said the Supreme Court of the United States, at the December term of that court, held in the year 1866, and after due argument and consideration the said the Supreme Court of the United States delivered its opinion and judgment in the said cause, affirming the said judgment or decree of the said the district court of the United States for the eastern district of Louisiana, and thereupon issued its mandate to carry the same into effect by force, whereof the said Rafael Madrazo became again entitled to receive the said deposit from the said United States; but owing to the insolvency and pending liquidation of the affairs of the said bank, as it was pretended by the said United States, acting through its officers aforesaid, the said United States was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution.

Seventh. That thereafter the affairs of the said bank were liquidated according to law aforesaid, and the receiver thereof declared several dividends upon the deposits therein at the time of its said insolvency and failure, including the said deposit of the proceeds of the sale of the said vessel and cargo.

Eighth. That the said United States, recognizing the right of the said Rafael Madrazo to the said deposit of the said proceeds, and in part payment thereof, applied the dividends thereon from time to time to the use of, and paid the same to the said Rafael Madrazo during his lifetime, and after his death to his legal representatives.

Ninth. That the said United States is entitled to credits upon the said deposit by payment of dividends just above referred to, as follows: By dividend No. 1, declared and paid May 27, 1871, amounting to $1,553.88; dividend No. 2, declared and paid December
6 22, 1871, amounting to $2,071.84; dividend No. 3, declared and paid April 28, 1871, amounting to $3,107.76; dividend No. 4, declared and paid October 31, 1879, amounting to $517.96, and dividend No. 5, declared and paid September 28, 1882, amounting to $932.33; the total of all which aggregates the sum of $8,133.77, thus leaving a balance of $2,175.43, for which, with interest, the petitioner brings this suit.

Tenth. That said Rafael Madrazo departed this life on or about the 14th day of April, 1877, at Havana, in the island of Cuba, where he then resided, and that his estate, consisting of goods, chattels, choses in action there situated, have been duly administered upon; but no administration of the claim herein made has yet been effected, nor has any payment thereon been made by the United States or any officer thereof.

And the petitioner further alleges as follows:

Eleventh. That on or about the 20th day of July, 1888, the petitioner, in conjunction with one Frederic R. Coudert and one Paul Fuller, duly applied to the surrogate of the county of New York for ancillary letters of administration upon the estate of the said Rafael Madrazo; whereupon, after due proceedings had, such letters of administration were duly granted to the petitioner herein on the 20th day of September, 1888.

Twelfth. That the petitioner has duly qualified as such administrator of the said Rafael Madrazo, and that the said Frederic R. Coudert and Paul Fuller have omitted and declined to qualify as such, whereby the petitioner is the sole administrator in the said behalf.

Thirteenth. That the full name of the said petitioner is Charles Coudert, and that he resides in the southern district of New York.

Wherefore the petitioner prays judgment for the above-
7 named sum of $2,175.43, with interest thereon from the 28th day of September, 1882, besides the costs and disbursements of this suit.

COUDERT BROTHERS,
Attorneys for the Petitioner.

CHS. COUDERT, *Petitioner.*

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

Charles Coudert, being duly sworn, deposes and says that he is the petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHS. COUDERT.

Sworn to and subscribed before me this 22d day of September, 1888.

[SEAL.] WM. F. RANDEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

(Endorsed:) U. S. circuit court, southern dist. of New York. Charles Coudert, ancillary executor of Rafael Madrazo, dec'd, petitioner, *vs.* The United States of America. Petition. Coudert Brothers, attorneys for petitioner, 68 & 70 William street, New York. Service of a copy of the within petition is hereby admitted. N. Y., 24 Sept., 1888. Stephen A. Walker, U. S. attorney. U. S. circuit court. Filed Sep. 24, 1888. John A. Shields, clerk.

8 Registered letter No. 15673. P. O., New York, N. Y.

Received Sep. 24, 1888, of Coudert Bros., 68 William St., a letter addressed to Augustus H. Garland, Washington, D. C.

H. G. PEARSON, *P. M.*
Per M. W.

Circuit Court of the United States, Southern District of New York.

CHARLES COUDERT, as Administrator of Rafael Madrazo, Deceased, }
vs.
THE UNITED STATES. }

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Richard Tone Pettit, being duly sworn, says that he is a clerk in the office of Coudert Brothers, the attorneys for the plaintiff above named; that he is of the age of eighteen years and upwards; that on the 24th day of September, 1888, he deposited in the general post-office in the city of New York, and caused to be registered as provided by law, a true copy of the petition herein, enclosed in a securely closed postpaid wrapper addressed to the Honorable Augustus H. Garland, Attorney General, Washington, District of Columbia.

That annexed hereto is the receipt which deponent received from the registry department of the said general post-office for said letter.

RICHARD TONE PETTIT.

Sworn to before me this 25th day of September, 1888.
WM. F. RANDEL,
Notary Public, Kings County.
[SEAL.]

Certificate filed in N. Y. Co.

9 (Endorsed:) U. S. circuit court, southern district of N. Y. Charles Coudert, as adm'r of Rafael Madrazo, *vs.* The United States. Aff't of mailing copy petition to Attorney General. Coudert Bros., 68 & 70 Wm. St., N. Y. city, N. Y. U. S. circuit court. Filed Sep. 26, 1888. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

CHARLES COUDERT, as Executor of Rafael Madrazo, Deceased, Petitioner,
against
THE UNITED STATES OF AMERICA, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York,* } *ss.:*

Richard Tone Pettit, being duly sworn, says that he is a clerk in the office of Coudert Brothers, the attorneys for the petitioner above named, and is of the age of eighteen years and upwards.

That on the 24th day of September, 1888, he duly served the petition herein on Stephen A. Walker, Esq., United States district attorney for the southern district of New York, by delivering a true copy of said petition to and leaving the same with a person in and in charge of the office of the said district attorney.

RICHARD TONE PETTIT.

Sworn to before me this 29th day of September, 1888.
WM. F. RANDEL,
Notary Public, Kings County.
[SEAL.]

Certificate filed in N. Y. Co.

10 (Endorsed:) U. S. circuit court, southern district of N. Y. Charles Coudert, as ancillary executor of Rafael Madrazo, dec'd, against The United States of America. Aff't of service of copy of petition on U. S. dist. att'y for southern district of N. Y. Coudert Brothers, 68 & 70 William street, New York city. U. S. circuit court. Filed Oct. 1, 1888. John A. Shields, clerk.

U. S. Circuit Court, Southern District of New York.

CHARLES COUDERT, Ancillary Executor of Rafael Madrazo, Deceased,
against
THE UNITED STATES OF AMERICA.

The United States of America, by Stephen A. Walker, United States attorney for the southern district of New York, for its answer

to the petition of Charles Coudert, ancillary executor of Rafael Madrazo, deceased, alleges:

That it has no knowledge or information as to any of the allegations of said petition, and it, therefore, denies the same and every part thereof.

Wherefore it demands that said petition be dismissed with costs.

STEPHEN A. WALKER,
U. S. Attorney.

(Endorsed:) U. S. circuit court, southern district of New York. Chas. Coudert, ancillary executor of Rafael Madrazo, deceased,
11 *versus* The United States of America. Answer. Stephen A. Walker, United States attorney, attorney for defendant. A copy of the within paper has been this day received. N. Y., Mar. 9, 1889. Coudert Brothers, attorneys. U. S. circuit court. Filed Mar. 11, 1889. John A. Shields, clerk. Judgment for plaintiff for full amount claimed. Counsel may submit findings on five days' notice. Oct. 10, 1894. E. H. Lacombe. U. S. circuit court. Filed Oct. 10, 1891. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

CHARLES COUDERT, Ancillary Executor of Rafael Madrazo, Deceased, Petitioner,
against
THE UNITED STATES OF AMERICA, Defendant.

This cause was duly tried before me without a jury. From the testimony taken and the stipulation as to facts, I make the following

Findings of Fact.

First. That on the 16th day of November, 1863, the Spanish bark "Teresita," together with her cargo, then the property of the above-named Rafael Madrazo, and while lying at anchor near the mouth of the Rio Grande river, in the gulf of Mexico, was captured by the United States steamer "Granite City" and brought to the port of New Orleans for condemnation, for alleged violation of the blockade then held by the military and naval power of the United States over the entrance to the said river.

12 Second. That pending an adjudication of the question whether or not the said bark "Teresita" had so violated the blockade, the said bark and her cargo were sold by the United States marshal for the eastern district of Louisiana, acting for and in behalf of the said United States, and the proceeds of such sale, after deducting costs, fees, commissions and other charges, and thus leaving the sum of $10,359.20, was, pursuant to a regulation of the Treasury Department of the United States then in force, deposited by the said marshal in the First National Bank of New Orleans, Louisiana, then a special or designated depositary of public moneys of the United States.

Third. That such proceedings were thereafter had with respect to the said capture in the district court of the United States for the eastern district of Louisiana, before which the said cause was brought by the United States, that the said district court pronounced its judgment or decree declaring the said capture unlawful, and therefore directed restitution of the said vessel and cargo to her said owner, by virtue of which the said Rafael Madrazo became entitled to receive from the said United States the said deposit, as representing and standing in the place and stead of the said vessel and cargo.

Fourth. That notwithstanding the said decision and judgment of the said district court, the said United States, acting through its agents, attorneys and servants, appealed therefrom to the Supreme Court of the United States, and caused a supersedeas or stay of execution of the said judgment or decree to be issued and effected, pending the hearing of the said appeal by the said Supreme Court of the United States.

Fifth. That thereafter the said cause came on for hearing in the said the Supreme Court of the United States, at the Decem-
13 ber term of that court, held in the year 1866, and after due argument and consideration the said the Supreme Court of the United States delivered its opinion and judgment in the said cause, affirming the said judgment or decree of the said the district court of the United States for the eastern district of Louisiana, and thereupon issued its mandate to carry the same into effect by force, whereof the said Rafael Madrazo became again entitled to receive the said deposit from the said United States; but owing to the insolvency and pending litigation of the affairs of the said bank, as it was pretended by the said United States, acting through its officers aforesaid, the said United States was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution.

Sixth. That pending the said appeal to the said the Supreme Court of the United States, the said The First National Bank of New Orleans, in which the said proceeds were deposited as aforesaid, became insolvent, stopped payment on all its obligations and was placed in the hands of a receiver, pursuant to the statute of the United States in such case made and provided.

Seventh. That thereafter the affairs of the said bank were liquidated according to law aforesaid, and the receiver thereof declared several dividends upon the deposits therein at the time of its said insolvency and failure, including the said deposit of the proceeds of the sale of the said vessel and cargo.

That the said United States, recognizing the right of the said Rafael Madrazo to the said deposit of the said proceeds, and in part payment thereof, applied the dividends thereon from time to time to the use of, and paid the same to the said Rafael Madrazo during his lifetime, and after his death to his legal representatives.

That the receiver paid on behalf of said claim to the said
14 Rafael Madrazo during his lifetime, and to his representatives after his death, the following sums of money on account of

the sum due by the United States on account of the proceeds arising from such unlawful capture and the subsequent sale of the vessel:

May 1, 1871	$1,553.88
Dec. 22, "	2,071.84
Ap'l 28, 1874	3,107.76
Oct. 31, 1879	517.96
Sept. 28, 1882	932.33
	$8,183 77

which leaves a balance of a sum of $2,175.43.

Eighth. That the receiver of the said First national bank has disposed of all the property of said bank which came into his hands, and that no more property will come into his hands which can be applied on account of the proceeds of the sale of the said vessel.

Ninth. That said Rafael Madrazo departed this life on or about the 14th day of April, 1877, at Havana, in the island of Cuba, where he then resided, and that his estate, consisting of goods, chattels, choses in action there situated, have been duly administered upon.

Tenth. That on or about the 20th day of July, 1888, the petitioner, in conjunction with one Frederic R. Coudert and one Paul Fuller, duly applied to the surrogate of the county of New York for ancillary letters of administration upon the estate of the said Rafael Madrazo; whereupon, after due proceedings had, such letters of administration were duly granted to the petitioner herein on the 20th day of September, 1888.

Eleventh. That the petitioner has duly qualified as such administrator of the said Rafael Madrazo, and that the said Frederic R. Coudert and Paul Fuller have omitted and declined to qualify as such, whereby the petitioner is the sole administrator in the said behalf.

Twelfth. That the full name of the said petitioner is Charles Coudert, and that he resides in the southern district of New York.

Thirteenth. The interest on the said sum of $2,175.43 from September 28th, 1882, amounts to the sum of $1,573.56.

From the foregoing facts I find as a

Conclusion of Law.

That the said petitioner, Charles Coudert, ancillary executor of Rafael Madrazo, deceased, is entitled to judgment against the United States of America for the sum of $3,748.98, with the costs and disbursements of this action.

Dated New York, October 24, 1894.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Charles Coudert, ancillary executor of Rafael Madrazo, deceased, petitioner, against The United States of America, defendant. Findings. Coudert Brothers, attorneys for petitioner, 68 & 70 Wil-

liam street, New York. To Wallace Macfarlane, Esq., U. S. district attorney. You will please take notice that the enclosed findings of fact will be presented to Hon. E. H. Lacombe, judge of this court, on October 23, 1894, at 11 o'clock a. m. October 17, 1894. Coudert Brothers, petitioner's att'ys. Service is admitted of a copy of the within findings and notice. Oct. 17, 1894. Wallace Macfarlane, attorney for def't. U. S. circuit court. Filed Oct. 24, 1894. John A. Shields, clerk.

16 United States Circuit Court, Southern District of New York.

CHARLES COUDERT, as Ancillary Executor of Rafael Madrazo, Deceased, Petitioner,
against
THE UNITED STATES OF AMERICA, Defendant.

Judgment, November 5th, 1894.

The issues in this action having been duly brought on for trial in this court, and the case having been duly submitted by the attorneys for the petitioner and defendant to the Hon. Judge Lacombe, on the 18th day of June, 1894, and the said judge having on the 10th day of October, 1894, rendered a decision in favor of the petitioner for the full amount claimed, and the said judge having on the 24th day of October, 1894, signed his findings, wherein it is recited as a conclusion of law "that the petitioner, Charles Coudert, ancillary executor of Rafael Madrazo, deceased, is entitled to judgment against the United States of America for the sum of $3,748.98, with the costs and disbursements of this action," and the said disbursements—the plaintiff not having taxed any costs against the defendant—having been duly taxed on the second day of November, 1894, in the sum of sixty-nine and $\frac{9}{100}$ dollars ($69.09):

Now, on motion of Messrs. Coudert Brothers, attorneys for the petitioner—

17 It is ordered, adjudged and decreed that the said petitioner, Charles Coudert, as ancillary executor of Rafael Madrazo, deceased, recover of the defendant, The United States of America, the sum of three thousand seven hundred and forty-eight dollars and ninety-eight cents, the amount claimed, together with the sum of sixty-nine dollars and nine cents disbursements, amounting in the aggregate to the sum of three thousand eight hundred and eighteen dollars and seven cents ($3,818.07).

Judgment signed this fifth day of November, A. D. 1894.

JOHN A. SHIELDS, *Clerk*.

(Endorsed:) United States circuit court, southern district of New York. Charles Coudert, as ancillary executor of Rafael Madrazo, deceased, petitioner, against The United States of America, defendant. Judgment Nov. 5th, 1894. Coudert Brothers, attorneys for petitioner, 68 & 70 William street, New York. U. S. circuit court. Filed Nov. 5, 1894, 3.42 p. m. John A. Shields, clerk.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 15th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable E. Henry Lacombe, circuit judge.

CHARLES COUDERT, Ancillary Executor of Rafael Madrazo, Deceased, Petitioner,
vs.
THE UNITED STATES OF AMERICA, Defendant.

A motion to amend the findings of fact herein coming on to be heard, upon all the proceedings had herein, and upon the affidavit and motion papers filed on behalf of defendants, after hearing Wallace Macfarlane, United States attorney, in favor of the motion, and Coudert Brothers, attorneys for plaintiff, opposing—

It is ordered, that the findings of fact, signed and filed herein October 24th, 1894, be and they are amended *nunc pro tunc:*

1. By striking out in the second finding, line 5, the words "acting for and on behalf of the said United States," and substituting therefor "by virtue of an order of the U. S. district court, eastern district of Louisiana, dated August 23, 1864, rendered in a suit in admiralty for the condemnation and forfeiture of said vessel and her cargo, which was commenced in said court on December 16, 1863, and in which The United States of America were libellants."

2. By amending the end of the second finding, by inserting the words "to await the further orders of the court."

3. By amending the third finding, line 9, by striking out therefrom the words "from the said United States."

4. By amending the fifth finding, line 11, by striking out the words "from the said United States."

5. By amending the fifth finding, lines 12, 13, 14 and 15, by striking out the words "as it was pretended by the said United States, acting through its officers aforesaid, the said United States."

6. By amending the seventh finding by striking out the second paragraph thereof, being the words, "That the said United States, recognizing the right of the said Rafael Madrazo to the said deposit of said proceeds and in part payment thereof, applied the dividends thereon from time to time to the use of, and paid the same to the said Rafael Madrazo during his lifetime, and after his death to his legal representatives."

7. By amending the seventh finding, line 16, by striking out the words "account of the sum due by the United States on."

So that the findings of fact herein be and they are filed *nunc pro tunc* to read as follows:

First. That on the 16th day of November, 1863, the Spanish bark "Teresita," together with her cargo, then the property of the above-

named Rafael Madrazo, and while lying at anchor near the
20 mouth of the Rio Grande river, in the gulf of Mexico, was captured by the United States steamer "Granite City," and brought to the port of New Orleans for condemnation, for alleged violation of the blockade then held by the military and naval power of the United States over the entrance to the said river.

Second. That pending an adjudication of the question whether or not the bark "Teresita" had so violated the blockade, the said bark and her cargo *was* sold by the U. S. marshal for the eastern district of Louisiana, by virtue of an order of the U. S. district court for the eastern district of Louisiana, dated August 23, 1864, rendered in a suit in admiralty for the condemnation and forfeiture of said vessel and her cargo, which was commenced in said court on December 16, 1863, and in which the United States of America were libellants, and the proceeds of such sale after deducting costs, fees, commissions and other charges, and thus leaving the sum of $10,359.20, was pursuant to a regulation of the Treasury Department of the United States then in force, deposited by the said marshal in the First National Bank of New Orleans, Louisiana, then a special or designated depositary of public moneys of the United States, to await the further orders of the court.

Third. That such proceedings were thereafter had with respect to the said capture in the district court of the United States for the eastern district of Louisiana, before which the said cause was brought by the United States, that the said district court pronounced its judgment or decree, declaring the said capture unlawful, and therefore directed restitution of the said vessel and cargo to her said owner, by virtue of which the said Rafael Madrazo became entitled to receive the said deposit, as representing and standing in the place and stead of the said vessel and cargo.

Fourth. That notwithstanding the said decision and judg-
21 ment of the said district court, the said United States, acting through its agents, attorneys and servants, appealed therefrom to the Supreme Court of the United States, and caused a supersedeas or stay of execution of the said judgment or decree to be issued and effected, pending the hearing of the said appeal by the said Supreme Court of the United States.

Fifth. That thereafter the said cause came on for hearing in the said the Supreme Court of the United States, at the December term of that court held in the year 1866, and after due argument and consideration the said the Supreme Court of the United States delivered its opinion and judgment in the said cause, affirming the said judgment or decree of the said the district court of the United States for the eastern district of Louisiana, and thereupon issued its mandate to carry the same into effect; by force whereof the said Rafael Madrazo became again entitled to receive the said deposit; but owing to the insolvency and pending litigation, the said bank was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution.

Sixth. That pending the said appeal to the said the Supreme Court of the United States, the said The First National Bank of New

Orleans, in which the said proceeds were deposited as aforesaid, became insolvent, stopped payment on all its obligations and was placed in the hands of a receiver, pursuant to the statute of the United States in such case made and provided.

Seventh. That thereafter the affairs of the said bank were liquidated according to law aforesaid, and the receiver thereof declared several dividends upon the deposits therein at the time of the said insolvency and failure, including the said deposit of the proceeds of the sale of the said vessel and cargo. That the receiver paid on behalf of said claim to the said Rafael Madrazo during his
22 lifetime, and to his representatives after his death, the following sums of money on account of the proceeds arising from such unlawful capture and the subsequent sale of the vessel:

May 1, 1871	$1,553 88
December 22, 1871	2,071 84
April 28, 1874	3,107 76
October 31, 1879	517 96
September 28, 1882	932 33
	$8,183 77

which leaves a balance of a sum of $2,175.43.

Eighth. That the receiver of the said First national bank has disposed of all the property of the said bank which came into his hands, and that no more property will come into his hands which can be applied on account of the proceeds of the sale of the said vessel.

Ninth. That said Rafael Madrazo departed this life on or about the 14th day of April, 1877, at Havana, in the island of Cuba, where he then resided, and that his estate, consisting of goods, chattels, and choses in action there situated, have been duly administered upon.

Tenth. That on or about the 20th of July, 1883, the petitioner, in conjunction with one Frederic R. Coudert and one Paul Fuller, duly applied to the surrogate of the county of New York for ancillary letters of administration upon the estate of the said Rafael Madrazo; whereupon, after due proceedings had, such letters of administration were duly granted to the petitioner herein on the 20th day of September, 1888.

Eleventh. That the petitioner has duly qualified as such administrator of the said Rafael Madrazo, and that the said Frederic R. Coudert and Paul Fuller have omitted and declined to qualify as such, whereby the petitioner is the sole administrator in the said behalf.

23 Twelfth. That the full name of the said petitioner is Charles Coudert, and that he resides in the southern district of New York.

Thirteenth. The interest of the said sum of $2,175.43, from September 28, 1882, amounts to the sum of $1,573.56.

From the foregoing facts I find as a conclusion of law that the said petitioner, Charles Coudert, ancillary executor of Rafael Madrazo,

deceased, is entitled to judgment against the United States of America for the sum of $3,748.98, with the costs and disbursements of this action.

March 30th, 1895.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. Charles Coudert, as ancillary executor, &c., *versus* United States. Order amending findings of fact. Wallace Macfarlane, United States attorney, attorney for defendant. U. S. circuit court. Filed Mar. 30, 1895. John A. Shields, clerk.

24 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, Plaintiffs in Error,
vs.
CHARLES COUDERT, as Ancillary Executor of Rafael Madrazo, Deceased, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the 4th day of April, 1895, before the judges of the said court, at the city of New York, come the said plaintiffs in error by Wallace Macfarlane, United States attorney for the southern district of New York, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears:

1st. That the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error; and

2nd. That the said judgment was not given for the said plaintiffs in error against the said defendant in error.

3rd. That the U. S. circuit court for the southern district of New York had no jurisdiction of the action, as it was one "sounding in tort."

4th. That the United States of America were held liable for the tort or torts of their alleged agents.

5th. That neither the petition nor the findings state any
25 good cause of action against the United States of America, nor do they sustain the judgment.

6th. That it appears from the petition and the findings of fact that the alleged cause of action was barred by the statutory period of limitation of six years.

7th. That the findings and the judgment award interest against the plaintiffs in error.

And the said plaintiffs in error pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for

nothing, and that they, the said plaintiffs in error, may be restored to all things which they have lost by occasion of said judgment, etc.

WALLACE MACFARLANE,
U. S. Attorney, Attorney for Plaintiffs in Error,
Room 50, P. O. Building, N. Y. City.

(Endorsed:) U. S. circuit court of appeals for the second circuit. United States *vs.* Charles Coudert, as ancillary executor, &c. Assignment of errors. Wallace Macfarlane, United States attorney, attorney for U. S. To Coudert Brothers, attorneys for def't in error. U. S. circuit court. Filed Apr. 4, 1895. John A. Shields, clerk.

26 UNITED STATES OF AMERICA, *ss:*

By the Honorable E. Henry Lacombe, one of the judges of the United States circuit court of appeals for the second circuit.

To Charles Coudert, as ancillary executor of Rafael Madrazo, deceased, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the second circuit, to be holden at the city of New York on the 30th day of April, eighteen hundred and ninety-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the southern district of New York, wherein The United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand in the city of New York, the 4th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

E. HENRY LACOMBE,
U. S Circuit Judge.

WALLACE MACFARLANE,
U. S. Attorney, Attorney for Plaintiffs in Error,
Room 50, Post-office Building, New York City.

(Endorsed:) U. S. circuit court of appeals for the second circuit. United States *vs.* Charles Coudert, as ancillary executor, &c. Citation. Wallace Macfarlane, United States attorney, attorney for U. S. To Coudert Brothers, attorneys for def't in error. A copy of the within paper has been this day received. N. Y., Apr. 4, 1895. Coudert Brothers, attorneys. U. S. circuit court. Filed Apr. 4, 1895. John A. Shields, clerk.

27 United States Circuit Court of Appeals for the Second Circuit, October Term, 1895.

Submitted February 20, 1896; decided April 7, 1896.

THE UNITED STATES, Plaintiff in Error,
vs.
CHARLES COUDERT, as Ancillary Executor of Raphael Madrazo, Deceased, Defendant in Error.

No. 74. In Error to the Circuit Court of the United States for the Southern District of New York.

Before Associate Justice Peckham and Judges Wallace and Shipman.

SHIPMAN, *Circuit Judge:*

Charles Coudert, as ancillary executor of Rafael Madrazo, brought a petition against the United States in the circuit court of the United States for the southern district of New York, under the act of March, 3, 1887 (24 Stat. at Large, 505), known as "the Tucker act," to recover a sum of money alleged to be due to the testator's estate from the United States. The writ of error to this court was brought to review the judgment of the circuit court in favor of the petitioner.

The following statement of the facts upon which the claim was based is admitted to be substantially correct:

In November, 1863, the United States vessel *Granite City* seized the Spanish bark *Teresita*, then the property of Rafael Madrazo, in the gulf of Mexico, as a blockade-runner, and brought the *Teresita* to New Orleans for condemnation, for alleged violation of the blockade by the military and naval power of the United States over the entrance to the Rio Grande river. Legal proceedings

28 for condemnation and forfeiture of the vessel as a prize were duly begun in the district court for the eastern district of Louisiana. During the progress of the condemnation proceedings and by virtue of an order of the district court for the eastern district of Louisiana, dated August 23, 1864, rendered in a suit in admiralty for the condemnation and forfeiture of said vessel and her cargo, which was commenced in said court on December 16, 1863, and in which The United States of America were libellants, the said bark and her cargo were sold by the United States marshal for the eastern district of Louisiana. The proceeds of such sale, amounting to $10,359.20, after deducting costs and other charges, were deposited by the marshal in the First National Bank of New Orleans, then a special or designated depositary of public moneys of the United States, to await the further orders of the court.

The district court thereafter decided in favor of the claimant against the United States. The United States appealed to the Supreme Court of the United States, obtaining a supersedeas, pending the appeal. At the December term of the Supreme Court in 1866, a decision was rendered affirming the decree of the district court in favor of the claimant and against the United States, and restitution of the vessel and cargo was directed. The *Teresita* (5 Wall., 180).

Pending the appeal, the First National Bank of New Orleans, in

which the proceeds of the sale of the *Teresita* had been deposited, failed and was placed in the hands of a receiver pursuant to law. Thereafter, in liquidating the affairs of the bank, the receiver paid to Madrazo during his lifetime, and to his representatives after his death, dividends amounting in all to $8,183.77. The first payment was made on May 1, 1871, and the last on September 28, 1882. Madrazo died in Cuba on the 14th day of April, 1877, and on the 20th day of September, 1888, ancillary letters of administration were issued in the county of New York to the defendant in error.

The receiver of the bank had no further assets in his hands
29 applicable to the payment of this claim after the payment of September 28, 1882, and the petition in this suit was filed on September 24, 1888, to recover a sum equal to the balance of the proceeds of the sale of the *Teresita*, after deducting the payments made by the receiver of the bank; that is to say, for the sum of $2,175.43. The circuit court awarded judgment to the petitioner, with interest from the 28th day of September, 1882.

It manifestly appears that the questions were so presented to the circuit court that the disposition of the case was considered to be a matter of routine.

The theory of the petitioner is that inasmuch as the final decree in the prize case directed the Government to make restitution of the *Teresita* and her cargo, and as the decree has not been fully complied with, a claim sounding in contract has arisen out of said decree, in favor of the decedent and his estate, against the Government. This theory omits consideration of the facts that the vessel and her cargo were sold by order of the district court, that the proceeds of such sale remained subject to its order in lieu of the vessel and cargo, that the fund was not deposited in the Treasury of the United States and that the Government is not responsible for its diminution. A similar claim against the United States, arising out of the failure of a bank in which the proceeds from the sale of cotton, seized under the confiscation act, had been deposited, was examined by the Supreme Court in Branch *v.* U. S. (100 U. S., 673). The suit for condemnation of the cotton had been dismissed and judgment had been entered for the defendants, who thereupon brought suit against the United States to recover the unpaid amount of the original deposit. The Supreme Court held that the money which had been deposited belonged for the time to the district court as a trust fund, that it was not paid into the Treasury, and that therefore the claimant was not entitled to recover.

In this case, also, the entire proceedings in regard to the sale of vessels and cargo and their proceeds having been taken by the district court, the Government is not responsible any more than was the petitioner or the decedent, for any calamity to the fund.
30 The decree of restitution of the vessel and cargo was a decree for whatever remained of the fund which was a substitute for the vessel and cargo.

The petitioner insists that no writ of error lies to this court from the judgment of the circuit court in an action brought against the Government of the United States under the provisions of the act of

March 3, 1887. It was settled in U. S. *v.* Davis (131 U. S., 36) that an appeal or writ of error lay to the Supreme Court from a judgment against the United States rendered under the jurisdiction conferred upon district or circuit courts by that act, and the contention of the petitioner is that as the Tucker act alone furnishes the district or circuit courts with jurisdiction to entertain actions against the United States, it alone controls the right of appeal or review.

The act of March 3, 1891, was intended to be a comprehensive statute which should regulate the jurisdiction of the Supreme Court by appeal or writ of error from the district and circuit courts. The fifth section provides six classes of cases in which appeals or writs of error may be taken directly to the Supreme Court from those courts and which do not include cases arising therein under the act of March 3, 1887. Section 6 provides that the circuit courts of appeals shall exercise appellate jurisdiction to review final decisions in the district and existing circuit courts in all cases other than those provided in the fifth section unless otherwise provided by law, and section 14 provided that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act" were repealed. The Supreme Court in Lau Ow Ben *v.* U. S. (144 U. S., 47) has shown that the words of section six "unless otherwise provided by law" were not intended to limit the effect of the general repealing provisions of section fourteen, but "were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when
31 expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause."

Immediately after the passage of the act of March 3, 1891, some uncertainty existed in the minds of learned counsel as to which court an appeal or writ of error should be taken in cases arising under the "Tucker act," but this uncertainty has disappeared.

The judgment of the circuit court is reversed.

Wallace Macfarlane, United States attorney, for the plaintiff in error.

Joseph Kling, for the defendant in error.

32 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States courtrooms, in the city of New York, on the 11th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Associate Justice R. W. Peckham and Circuit Judges Wm. J. Wallace and Nathaniel Shipman.

THE UNITED STATES OF AMERICA, Plaintiffs in Error,
vs.
CHARLES COUDERT, Ancillary Executor of Rafael Madrazo, Deceased, Defendant in Error.

The writ of error to the circuit court of the United States for the southern district of New York to review the judgment of said court entered herein on the 5th day of November, 1894, having come on to be heard, and due deliberation having been had thereon—

Now, on motion of Wallace Macfarlane, U. S. attorney, of counsel for The United States, plaintiffs in error, it is—

Ordered that the decision aforesaid be, and the same hereby is, in all things reversed, with costs to plaintiffs in error in both courts; and it is further—

Ordered that a mandate issue to the circuit court of the United States for the southern district of New York, directing that court to proceed*ing* in accordance with the opinion of this court, and to award judgment in favor of the plaintiffs in error.

W. J. W.
N. S.

33 (Endorsed:) U. S. circuit court of appeals for the second circuit. United States *vs.* Charles Coudert, as ancillary executor, &c. Order for mandate. Wallace Macfarlane, United States attorney, attorney for United States. United States circuit court of appeals, second circuit. Filed May 12, 1896. James C. Reed, clerk.

34 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, Plaintiff in Error,
against
CHARLES COUDERT, as Ancillary Executor of Rafael Madrazo, Deceased, Defendant in Error.

Afterwards, to wit, on the twenty-fifth day of March, one thousand eight hundred and ninety-seven, comes the said Charles Coudert and saith that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

That the court reversed the judgment of the circuit court of the United States for the southern district of New York, and directed said court to award judgment in favor of the above-named plaintiff in error, whereas of right and by the law of the land the said writ of error should have been dismissed or the said judgment affirmed.

By reason of the aforesaid error the said defendant in error has sustained great damage, and he prays that the said error be reversed and annulled, and that he be restored to all rights which he has lost by the said error.

CHARLES COUDERT,
As Ancillary Executor, &c.,
By COUDERT BROTHERS,
His Solicitors.

35 (Endorsed:) United States circuit court of appeals for the second circuit. The United States, plaintiff in error, *vs.* Charles Coudert, as ancillary executor, &c., defendant in error. Assignment of errors. Coudert Brothers, attorneys for defendant in error, 110 Broadway, New York. United States circuit court of appeals, second circuit. Filed Mar. 25, 1897. James C. Reed, clerk.

36 To the honorable the Chief Justice of the United States and the associate justices of the Supreme Court of the United States:

The petition of Charles Coudert, as ancillary executor of the last will and testament of Raphael Madrazo, respectfully shows to your honors:

That your petitioner, as executor aforesaid, on the twenty-second day of September, 1888, brought an action in the circuit court of the United States for the southern district of New York against the United States of America to recover the sum of two thousand one hundred and seventy-five dollars, the value, less payments applied on account thereof, of the Spanish bark Teresita, which had been seized by the United States authorities for alleged violation of the neutrality laws, and which had, after trial, been ordered to be restored to the possession of the said Raphael Madrazo; which said vessel had in the meantime been appropriated and sold by the United States; in which action the United States appeared and answered.

That the action brought by your petitioner was duly brought to trial before the Honorable E. Henry Lacombe, who duly filed his findings of fact and conclusion of law, in which he found that the facts stated in the petition of your petitioner were true, and that your petitioner was entitled to judgment against the United States for the sum of three thousand seven hundred and forty-eight dollars and ninety-eight cents, with the costs and disbursements of said action.

37 That costs were subsequently taxed and judgment was duly rendered in the said action on the fifth day of November, 1894, against the United States of America for the sum of three thousand eight hundred and eighteen dollars and seven cents.

That the United States of America, for the purpose of reviewing said judgment, sued out a writ of error from the United States circuit court of appeals for the second circuit; which said writ of error was duly allowed and the record of said cause duly transmitted to the said United States circuit court of appeals.

That the said cause duly came on to be heard by the said United States circuit court of appeals; which said court ordered that the said judgment of the said circuit court of the United States for the southern district of New York be reversed; whereupon judgment was entered in the said action in the said United States circuit court of appeals for the second circuit reversing the judgment of the said circuit court and directing said court to award judgment in favor of the said plaintiffs in error.

And your petitioner shows that in the record and proceedings had in said United States circuit court of appeals manifest errors have happened, to the great damage of your petitioner, as appears by the assignment of errors filed in the said action in the office of the clerk of the United States circuit court of appeals for the second circuit, and your petitioner is desirous that the Supreme Court of the United States should correct that error and to that end
38 cause a writ of error to be issued.

Wherefore your petitioner prays that a writ of error in the Supreme Court of the United States may be issued in the said action, and that the judgment rendered therein and the record therein and all proceedings concerning the same be sent to the Chief Justice of the United States and the associate justices of the Supreme Court of the United States.

And your petitioner will ever pray, &c.

Dated New York, March 26th, 1897.

CHARLES COUDERT,
As Ancillary Executor of the Last Will and Testament of Rafael Madrazo, Petitioner,
By JOSEPH KLING,
His Counsel, and
COUDERT BROTHERS,
Solicitors.

JOSEPH KLING,
Of Counsel for Petitioner.

(Endorsed:) United States circuit court of appeals for the second circuit. The United States, plaintiff in error, *vs.* Charles Coudert, as ancillary executor, &c., defendant in error. Petition. Coudert Brothers, attorneys for defendant in error, 100 Broadway, New York. United States circuit court of appeals, second circuit. Filed Apr. 1, 1897. James C. Reed, clerk.

39 Know all men by these presents that we, Paul Fuller, residing at No. 30 Washington square north, in the city, county, and State of New York, and Frederic R. Coudert, Jr., residing at No. 13 East 45th street, in the city, county, and State of New York, are held and firmly bound unto the United States of America in the sum of two hundred and fifty dollars, to be paid to the United States of America; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our personal representatives, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of March, one thousand eight hundred and ninety-seven.

Whereas Charles Coudert, as ancillary executor of Rafael Madrazo, deceased, as plaintiff in error, has prosecuted an appeal to the Supreme Court of the United States from a judgment of the United States circuit court of appeals for the second circuit, bearing date May 11, 1896, in an action wherein the said United States of America

was plaintiff in error and the said Charles Coudert, as ancillary executor, as aforesaid, was defendant in error:

Now, therefore, the condition of the above obligation is such that if the above-named plaintiff in error shall prosecute this writ of error to *the* effect and pay all costs which may be awarded against him, as such plaintiff in error, if his appeal is not sustained, then this obligation to be void; otherwise to remain in full force and effect.

40 FREDERIC R. COUDERT, JR. [SEAL.]
PAUL FULLER. [SEAL.]

Sealed and delivered and taken and acknowledged before me this 18th day of March, 1897.

HARMON S. GRAVES,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

Paul Fuller and Frederic R. Coudert, Jr., being severally duly sworn, each deposes and says that he resides in the southern district of New York, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities and property exempt by law from execution.

FREDERIC R. COUDERT, JR.
PAUL FULLER.

Sworn to before me this 18th day of March, 1897.

HARMON S. GRAVES,
Notary Public, N. Y. Co.

The foregoing is approved of as to form, amount, and sufficiency of sureties.

Dated Washington, March 26th, 1897.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) Supreme Court of the United States. Charles Coudert, administrator, against United States. Bond on writ of error. Coudert Brothers, attorneys for plaintiff, 100 Broadway, New York. United States circuit court of appeals, second circuit. Filed Apr. 1, 1897. James C. Reed, clerk.

41 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein Charles Coudert, as ancillary executor of the last

will and testament of Raphael Madrazo, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 26th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

42 [Endorsed:] A copy of the within paper has been this day received at this office. Apr. 1, 1897. Wallace Macfarlane, U. S. attorney. United States circuit court of appeals, second circuit. Filed Apr. 1, 1897. James C. Reed, clerk. Ap'l 26.

Service is hereby admitted of a copy of the within.
April 1, 1897.

——— ———.

Endorsed on cover: Case No. 16,580. U. S. C. C of appeals, 2nd circuit. Term No., 15. Charles Coudert, as ancillary executor of the last will & testament of Raphael Madrazo, deceased, plaintiff in error, *vs.* The United States. Filed May 5th, 1897.

Supreme Court of the United States.

CHARLES COUDERT, as Ancillary Executor of the Last Will and Testament of RAPHAEL MADRAZO, deceased,

Plaintiff in Error,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

Brought up by writ of error to the U. S. Circuit Court of Appeals for the Second Circuit, this case raises the question whether the said Court *erred* in reversing the judgment theretofore rendered by the U. S. Circuit Court for the Southern District of New York in favor of Coudert, as Executor of Madrazo, the plaintiff in error here, and directing the said Circuit Court to award judgment in favor of the United States (plaintiffs in error in the said Circuit Court of Appeals, and defendants in error here).

The question of law involved is, whether, in this proceeding under the "Tucker" Act (Law of March 3, 1887: 24 Statutes at Large, 505), the United States could and should be held liable to the Executor of Madrazo, deceased, for the *unpaid balance* of the proceeds of the Spanish bark *Teresita*, belonging to Madrazo, which was seized during the war of the Rebellion by the United States vessel *Granite City* for

alleged breach of blockade, and sold pending proceedings in prize, but of which *restitution* was ordered, first by the District Court, and finally, on appeal, by this Court (5 Wallace, 180).

The question is raised under the following circumstances:

"Pending an adjudication of the question whether or "not the bark *Teresita* had so violated the blockade, "the said bark and her cargo were sold by the U. S. "Marshal for the Eastern District of Louisiana, by "virtue of an order of the U. S. District Court for "the Eastern District of Louisiana, dated August 23, "1864, rendered in a suit in admiralty for the con-"demnation and forfeiture of said vessel and her "cargo, which was commenced in said Court on "December 16, 1863, and in which the United States "of America were libellants, and the proceeds of such "sales, after deducting costs, fees, commissions and "other charges, and thus leaving the sum of "$10,359.20, was *pursuant to a regulation of the "Treasury Department of the United States then in "force*, deposited by the said Marshal in the First "National Bank of New Orleans, Louisiana, *then a "special or designated depositary of public moneys of "the United States*, to await the further orders of the "Court" (*Second Finding of Fact*, Record, p. 13).

"Such proceedings were thereafter had * * * "that the said District Court pronounced its judgment "or decree, declaring the said capture unlawful, and "therefore directed *restitution* of the said vessel and "cargo to her said owner." * * * (*Third Finding of Fact*, Record, p. 13).

"* * * The said United States appealed there-"from to the Supreme Court of the United States, "and caused a supersedeas or stay of execution of the "said judgment or decree to be issued and effected, "pending the hearing of the said appeal * * *" (*Fourth Finding of Fact*, Record, p. 13).

"* * * At the December Term of that Court "held in the year 1866, and after due argument and "consideration the said Supreme Court of the United

"States delivered its opinion and judgment in the "said cause, affirming the said judgment or decree" (of restitution), "and thereupon issued its mandate to "carry the same into effect * * *" (*Fifth Finding of Fact*, Record, p. 13).

That under and by virtue of the said decree of restitution, five several partial payments were made, on account of the said net proceeds of the vessel and cargo, by the Receiver of the said First National Bank of New Orleans, to the said Rafael Madrazo, during his life, and his representatives after his death; such payments having been made in the amounts, and at the dates, following (respectively):

May 1, 1871	$1,553 88
Dec. 22, 1871	2,071 84
April 28, 1874	3,107 76
October 31, 1879	517 96
September 28, 1882	932 33
Making a total of	$8,183 77

which *left unpaid*, of the said net proceeds of the vessel and cargo, a balance of $2,175.43 (*Sixth and Seventh Findings*, Record, p. 14).

By the last of said partial payments, namely, the dividend of $932.33, made on September 28, 1882, the Receiver of the said National Bank exhausted the entire proportion of the assets of the said Bank, corresponding to the deposit so theretofore made as aforesaid of the net proceeds of the vessel and cargo (*Eighth Finding*, Record, p. 14).

Within six years of the date of the said last payment on account of the said net proceeds of the vessel and cargo, to wit: on the 24th day of September, 1888, the Executor of said Madrazo filed his petition under the Act of March 3, 1887 (24th Statute at Large, 505; 1 Supplement Revised Statutes, 559), commonly known as the "Tucker Act," to claim the balance (Record, p. 6).

On the facts above recited, the Circuit Court, under date of Nov. 5, 1894, gave judgment for the claimant

for $3,818.07 (being the unpaid balance claimed plus interest on the same, as the disbursements in the action).

On May 12, 1896, the Circuit Court of Appeals reversed said judgment and *ordered judgment in favor of the United States* (Record, p. 20).

Assignment of Error.

"That the Court reversed the judgment of the Circuit Court of the United States for the Southern "District of New York, and directed said Court to "award judgment in favor of the above-named plaintiff in error" (the United States) "whereas by right "and by the laws of the land the said writ of error "should have been dismissed or the said judgment "affirmed."

Brief of the Argument.

I.—Under the law applicable to such a case as that presented by the record in this case, the net proceeds of the vessel and cargo must be deemed to have been had and received by the United States, by its payment, in accordance with law, into the Treasury of the United States, and, consequently, a sum of money equal to the *whole* of such net proceeds, must be held to have become payable to the claimant, by the United States, under the decree of restitution, wholly irrespective of any loss of particular *assets* of the Treasury through the failure of a "designated depositary" bank.

II.—The vessel and cargo, and, afterwards, the net proceeds of the sale thereof, having been held by the Government *as trustee* for those who, by the decree of the Court, should be held to have the ultimate right to it, it was not until *after such trustee in some way disavowed the trust*, which it did not do until after it ceased to make payments on account of such proceeds, on the

28th day of September, 1882, that the *cause of action* embodied in this claim really arose. Accordingly, as this proceeding was commenced on the 24th day of September, 1888, or clearly within 'six years' of the time in question, the claim is *not* barred by the limitation prescribed in the statute.

III.—The objection made to the judgment of the Circuit Court (the reversal of which is now under review) on the ground that in computing the claimant's "*damages*" the Circuit Court took into consideration the *length of time during which the wrongful withholding of the balance due continued*, and so made the *damages* larger by an amount which it called "interest," may not be so *certainly* a *sound* objection as the counsel for the Government seems to have deemed it in the Court below. But even assuming, for the sake of the argument, that the objection *is* really a sound one, and that the Circuit Court erred in computing into the sum allowed as damages the amount which it called "interest," this circumstance would not, in and of itself, require or justify the judgment of the Circuit Court of Appeals ordering *judgment in favor of the United States.* At the *utmost*, the recognition of this alleged error as to "interest" need have led only to a reduction of the *amount* of the judgment to the extent of the sum improperly allowed.

POINTS.

I.

Under the law applicable to such a case as that presented by the record in this case, the net proceeds of the vessel and cargo must be deemed to have been had and received by the United States, by their payment, in accordance with law, into the Treasury of the United States; and, consequently, a sum of money equal to the whole of such net proceeds must be held to have become payable to the claimant by the United States, under the decree of "restitution," wholly irrespective of any loss of particular assets of the Treasury through the failure of a "designated depositary" bank.

The foregoing proposition ("Point I") formulates the contention of the claimant as to the question at issue in this case, upon the *merits*.

The argument of the learned U. S. District Attorney for the Southern District of New York in opposition to the claim, and the opinion of the learned Circuit Court of Appeals seeking to justify that judgment against the claimant, which is now under review, *both* proceeded upon the assumption that, in the decision of this case, the Court must treat the net proceeds of the Marshal's sale of the *Teresita* and her cargo, as NOT having been "paid into the Treasury of the United States," but simply as being "money in *Court*," in the ordinary sense. And both the learned District Attorney and the Court accordingly relied upon the decision of this learned Court in the *Branch* case (100 U. S., 673), as a decision upon an exactly analagous case, which conclusively settled the law governing this case, adversely to the claimant.

That is to say, on the *merits*, the Circuit Court of Appeals ordered judgment for the United States (thus finally rejecting the claim), upon the one ground described, and which is set forth as follows, in the opinion of the Court (*Record*, p. 18, folio 29).

"The theory of the petitioner," says the opinion, "is that inasmuch as the final decree in the prize case "directed the Government to make restitution of the "*Teresita* and her cargo, and as the decree has not "been fully complied with, a claim sounding in con- "tract has arisen out of said decree, in favor of "the decedent and his estate, against the Government. "This theory *omits consideration* of the facts that the "vessel and her cargo were sold by order of the Dis- "trict Court, that the proceeds of such sale remained "subject to its order in lieu of the vessel and cargo, "*that the fund was not deposited in the Treasury of* "*the United States and that the Government is not re-* "*sponsible for its diminution.* A similar claim against "the United States, arising out of the failure of a bank "in which the proceeds from the sale of cotton *seized* "*under the* CONFISCATION ACT" (*nota bene*) "had been de- "posited, was examined by the Supreme Court in Branch "*v.* U. S. (100 U. S., 673). The suit for condemnation "of the cotton had been dismissed and judgment had "been entered for the defendants, who thereupon "brought suit against the United States to recover the "unpaid amount of the original deposit. The Su- "preme Court held that the money which had been "deposited belonged for the time to the District Court "as a trust fund, that it was not paid into the Treasury, "and that, *therefore*, the claimant was not entitled to "recover. In this case, also, the entire proceedings in "regard to the sale of vessel and cargo and their pro- "ceeds having been taken by the District Court, the "Government is not responsible any more than was "the petitioner or the decedent, for any calamity to "the fund. The decree of restitution of the vessel "and cargo was a decree for *whatever remained of the* "*fund* which was a substitute for the vessel and "cargo." (*Record*, p. 18, folio 29.)

Such, then, is the learned Court's criticism of the claimant's "theory": "This theory," says the Court "*omits consideration* of the facts (1), that the vessel "and her cargo were sold by order of the District "Court (2), that the proceeds of sale remained subject "to its order in lieu of the vessel and cargo, (3), that "the fund was not deposited in the Treasury of the "United States, and (4), that the Government is not "responsible for its diminution."

Under the circumstances the statement that our theory "omits consideration" of "facts" "(1)," and "(2)," must have meant that our theory was *inconsistent* with the "facts" in question. (Taken *literally*, nothing could be more absurdly untrue, on the face of the record, and claimant's brief, than the statement that the claimant's position "omits consideration" of the very "facts" upon which that position is *expressly* BASED!) The learned Court evidently meant to argue thus:—INASMUCH *as* "the vessel and cargo were sold by order of the District Court," and "the proceeds of sale remained subject to its order in lieu of the vessel and cargo," the *legal* INFERENCE must be (there certainly was neither *evidence* nor a *finding of fact* to this effect), that "the fund was *not* deposited in the Treasury of "the United States and (*hence*), that the Government "is not responsible for its diminution."

Such being unquestionably the argument against us, we respectfully but unhesitatingly assert that it embodies, or consists of an absolute *non sequitur*.

The *Teresita* and her cargo having been sold in *prize* proceedings, (in 1864) the *legal* PRESUMPTION is (and there is nothing in the record to contradict it), *that the proceeds of the sale were deposited in the Treasury of the United States*, it having been *the positive* REQUIREMENT *of the* LAW, that such proceeds of "prize" SHOULD be so deposited in the Treasury of the United States.

"Since the act of Congresss of the 3d of March, 1849," said the Supreme Court of the United States, "it appears to be the intention and the positive man- "date of Congress, that ALL *prize money arising from* "*captures by vessls of the navy of the United States*,

" *whether received by marshals for the sale of prizes*, or " in the hands of prize agents, should be deposited in the " Treasury of the United States. *Vide* § 8th of the act, " Stats. at Large, Vol. IX, p. 378."

Jecker et al. v. *Montgomery*, 59 U. S., 125.

" Sec. 8. *And be it further enacted*, That from and " after the passage of this act, *all prize money*, arising " from captures made by the vessels of the navy of " the United States, received by the marshal who " shall make sale of such prizes, shall, within sixty " days after such sale, *deposit the net proceeds*, after " paying all charges, as now provided by law, into " the treasury of the United States,"

9 *Stats. at Large*, p. 378, Sec. 8.

An act of Congress approved March 3, 1863, entitled " *An Act further to regulate Proceedings in Prize* " *Cases, and to amend various acts of Congress in* " *Relation thereto*," provided as follows:

" *Be it enacted by the Senate and House of Repre-* " *sentatives of the United States of America in Con-* " *gress assembled*, That whenever ANY *prize property* " shall be condemned in any district or circuit court, " or shall *at any stage of the proceedings* be found by " the court to be perishing, perishable, or liable to de- " teriorate or depreciate, or whenever the costs of " keeping the same shall be disproportionate to its " value, or whenever all the parties in interest who " have appeared in the case shall agree thereto, it shall " be the duty of the court to order a sale thereof, and " no appeal shall operate to prevent the making or exe- " cution of such order. And upon any sale, *it shall* " *be the* DUTY *of the marshall forthwith to deposit the* " *gross proceeds of the sale with the Assistant* TREASURER " *of the United States nearest to the place of sale*, and " *subject to the order of the court in the particular* " *case;* and *the court may at any time order the pay-* " *ment from such deposit* of the expenses and disburse- " ments necessarily incurred in the custody, preserva-

" tion, and sale of said property, audited and allowed " by the court in the manner provided by law."

Chapter 86, Laws of 1863, Sec. 1 (12 U. S. Stats. at Large, p. 759).

(See also § 2 of the same act, as further illustrating the policy).

An act of Congress, approved June 30, 1864, and entitled: "*An Act to regulate Prize Proceedings and the distribution of Prize Money, and for other purposes,*" contained the following provisions:

" SEC. 7. *And be it further enacted*, That the mar- " shal shall safely keep ALL *prize property* under war- " rant from the Court, and shall report to the Court " any cargo or other property that he thinks requires " to be unladen and stored, or to be *sold*. He shall " insure prize property if, in his judgment, it is for the " interest of all concerned. * * * If a sale of prop- " erty is ordered, he shall sell the same in the manner " required by the Court, and collect the purchase mo- " ney, and *forthwith deposit the gross proceeds of the* " *sale with the Assistant Treasurer of the United States* " *nearest the place of sale*, subject to the order of the " Court in the particular cause."

Chapter 174, Laws of 1864 (13 U. S. Stats. at Large, p. 308.)

(See also end of Section 1 of the same statute).

This legislation (which, indeed, has apparently not been substantially amended since) was in force, in this form, during the entire course of the prize proceedings against the *Teresita*.

The legal presumption is that the Marshal did his duty.

Gonzalez v. *Ross*, 120 U. S., 605;

Nofire v. *U. S.*, 164 U. S., 660;

Bank of U. S. v. *Daxbridge*, 12 Wheat., 64, 70;

Rankin v. *Hoyt*, 4 How. 327;
Butler v. *Maples*, 9 Wall., 766;
Weyawega v. *Ayling*, 99 U. S., 112;
Callaghan v. *Myers*, 128 U. S., 617;
Keyser v. *Hitz*, 133 U. S., 138;
Knox County v. *Ninth National Bank*, 147 U. S., 91, 97.

Not only is there nothing in the case to offset the presumption of the correctness and legality of official action, but, on the contrary, the *Findings of Fact* in the record (even as amended at the solicitation of the District Attorney), affirmatively *confirm* the presumption, by reciting, in so many words, that "the *proceeds of such sale* * * * the sum of $10,359.20, *was*, PURSUANT TO A REGULATION OF THE TREASURY DEPARTMENT *of the United States then in force, deposited by the said Marshal in the First National Bank of New Orleans, then a special or* DESIGNATED DEPOSITARY *of* PUBLIC MONEYS *of the United States.*"

(*Second Finding of Fact*, Record, p. 13.)

Such "designated depositaries" are distinctly recognized as parts of the regular machinery of the Treasury, in the Title on the "Department of the Treasury" in the Revised Stututes."

Title VII., Chapt. Five, §§ 306, 310.

The theory of the learned Circuit Court of Appeals "omits consideration of the facts" that *the law* REQUIRED the deposit of the proceeds of PRIZE property in the Treasury of the United States, *pending proceedings*, and that, *in the light of this requirement*, the fact recited in the *findings* of the learned Circuit Judge—that the deposit was made "*pursuant to a regulation of the Treasury Department then in force, in a 'designated depositary of public moneys,'*"—establishes the correctness of the claimant's view, having a significance and effect which, *by itself*, and in the *absence* of such a "positive mandate" of Congress, the fact in question would certainly not have had.

The "Confiscation Act" under which the *Branch*

case was decided (100 U. S., 673) contained no analogous provision for the deposit in the Treasury, *pendente lite*, of the proceeds of property seized but *not yet finally condemned*. It was only the proceeds of property which had been *finally condemned* as properly confiscated, that *that* legislation directed the deposit of in the Treasury. Accordingly, in a case under that act—such as the *Branch* case was—it was, *of course*, true that the *mere* circumstance that money (which had *not* been finally condemned) had been, *pending* proceedings, deposited by the Marshal in a bank which happened to be a "designated depositary," did not, in and of itself, make the deposit there a deposit in the Treasury, or transform the money into Government assets. *Under such circumstances*, it is *of course* true that, as this learned Court declared, "no officer of the United "States can charge the Government with liability for "moneys in his hands *not* public moneys by depositing "them to his own credit in a bank designated as a depositary." But, in *prize* cases, and therefore in the *Teresita* case, *the express and repeated* enactments *of* Congress—*not* the volunteered and unauthorized act of an "*officer*" of the United States—had established it as the Government's *policy* to receive into the Treasury, *pending* proceedings for condemnation, the proceeds of "prize property." By this policy—*one by no means confined to this sort of case*—the United States, *conscious of its own absolute solvency*, and *sensibly exploiting in the public interest its perfect ability to have the amounts forthcoming whenever the time should come for finally applying them*, has received such sums *into*, and *as assets of*, its Treasury, as banks receive the "general deposits" of their customers, and *with the same benefit which banks derive from this sagacious practice*—namely, the securing thereby, *without interest*, of assets available for their purposes; the securing, in other words, of a *non-interest bearing* Loan to the amount of the sums in question. (In view of the fact that *even though* it has *thus been aided by many receipts upon which no interest was payable*, the Government has *still* felt called upon to anticipate its

revenues from taxation, by huge *interest bearing* "*loans*," the policy described is seen to be, not an eccentricity not lightly to be imputed to the Government, but, on the contrary, *so clearly the obviously wise and practical policy* that its *non*-adoption would have been almost criminally foolish, and its adoption so likely, so *presumable*, that far less explicit legislation than that cited might well have been accepted by this Court as sufficiently establishing its enactment).

Of course, with the Treasury as with the Banks, it is an absolutely indispensable condition of this most profitable practice—of this exploiting of the *responsibility* of the institution—that in point of fact the sums received as deposits and so mingled with and made a part of the available 'cash' *assets* of the Treasury or Bank (as the case may be), SHALL *be* "*forthcoming*" *at the proper time*, as in fulfilment of an *obligation* of the institution, *wholly unaffected* by the circumstances that *a loss* or diminution of assets may have been incurred through the insolvency of *a bank in which the Treasury kept an account.* (It is, indeed, only with reference to a case in which deposit in the Treasury is held *not* to have been made, that the responsibility of the Government is denied, either in the *Branch* case, or by the learned Circuit Court of Appeals).

The fact that the deposit is to be "*subject to the order of the Court in the particular cause*" implies nothing inconsistent with the view that it *was* a "DEPOSIT," *in the usual sense of the word.* It certainly was not a *storing*, in a "safe deposit box," of concrete, *particular coins or bills*, to be *identically*, *specifically* RETURNED on the order of the Court. "The Court" was simply to have a *credit in* ACCOUNT with this *branch* of the *Government bank* (so to speak), and the fact that it was *that* "account" (instead of some other) that was to be opened by the transaction, is no more inconsistent with the money's having been received by the Treasury *on precisely the same basis on which a private bank receives its general* "*deposits*," than, in the case of the latter, the circumstance that

the *amount* of every such general deposit is credited in *some* account, and is "subject to the order" of the person to whose credit it is placed, is inconsistent with the money's having by the deposit, become the *property* of the bank, while the latter, by so accepting it, incurs the obligation to *pay the* AMOUNT (NOT *to return the specific coins or bills deposited*). Having, by its armed vessel, forcibly (and, as its own Courts decided, unlawfully) seized the *Teresita* and its cargo; *compelled* their sale by *its* marshal, and *the "deposit" of the proceeds with its "assistant* TREASURER," *in its "designated depositary of* PUBLIC MONEYS"—thereby enabling and authorizing its Treasury to draw upon that depositary for just so much more money, for *any* purpose—the United States could not decently do less than make itself responsible for the *amount* so taken and mingled with its own assets. This responsibility was provided for by the enactment giving the Court which was to pass upon the rights of claimants to the "prize property," a CREDIT *for the* AMOUNT, upon the appropriate branch of the Treasury.

The enactment in question was in effect *an* APPROPRIATION *of moneys in the Treasury*, to the amount of the "proceeds" of which restitution might be ordered. If it was made payable through a particular "depositary of public moneys," this was only for the same reasons of convenience in book-keeping, &c., which leads to the making of *money-orders* payable only at a designated P. O. money-order office, though, (unquestionably) only actual *payment* of the whole amount would discharge the Government's obligation in the matter, and a defalcation by the particular postmaster concerned would not be deemed an excuse for a failure to pay the whole sum due.

Surely—we most respectfully submit—the foregoing considerations fully justify our claim, upon the *merits*, that, "under the *law* applicable to such a case as that presented by the record in this case, the net proceeds of the vessel and cargo must be deemed to have been 'had and received' by the United States, *through their having been paid*, IN ACCORDANCE WITH LAW, *into the*

Treasury of the United States; and, consequently, a sum of money equal to the *whole* of such proceeds must be held to have become payable to the claimant by the United States, under the decree of 'restitution,' *wholly irrespective of any loss of particular* ASSETS *of the Treasury through the failure of a 'designated depository' bank.*"

II.

The vessel and cargo, and afterwards the net proceeds of the sale thereof, having been held by the Government "as Trustee" for those who by the decree of the Court should be held to have the ultimate right to it was not until after such Trustee in some way disavowed the trust—which it did not do until after it ceased (on September 28, 1882), to make payments on account of such proceeds, and declined to recognize our demand for the balance—that the cause of action embodied in this claim really arose. Accordingly as this proceeding was commenced on the 24th day of September, 1888, or clearly within "six years" of the time in question, the claim is not "barred" by the limitation prescribed in the statute.

The principle which the foregoing proposition applies to the present case has heretofore, *in a strictly analogous sort of case*, been expressly recognized and practically applied, by this learned Court. As was said in an opinion of the Court of Claims *quoted* in *Rice* v. *United States* (127 U. S., 620): "In *Taylor's case*, 104 U. S., 216, 222, the SUPREME COURT *called the United States* "TRUSTEES" of the surplus money paid into

the Treasury from the sales of lands for taxes under the direct tax acts (12 Stats., 292, 422, 640; 14 Stat., 568) over and above that which was required to pay the tax, interest and costs. That Court did not treat the case as one in equity, and upon a finding of facts by this Court, as in cases at law, they held, as to the Statute of Limitations, that 'the right of the owner of the land to recover the money which the government held for him as his trustee, did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued,' and that statute began to run."

In the case referred to we find the following:

"The second question raised by the appeal is whether "the Court of Claims had jurisdiction of a suit for "such proceeds, *when the application to the Secretary "of the Treasury, and the bringing of the suit therefor, "were both more than six years after the sale.*"

"Sect. 1069 of the Revised Statutes provides that "every claim against the United States cognizable by "the Court of Claims shall be forever barred, unless "the petition setting forth a statement thereof is filed "in the Court within six years after the claim first "accrues.

"The thirty-sixth section of the act of 1861 re-"quired, as we have seen, the surplus proceeds of the "sale of land for taxes to be deposited in the Treasury, "to be there held for the use of the owner or his legal "representatives until he or they should make appli-"cation therefor to the Secretary of the Treasury, "who, upon such application, should, by warrant on "the Treasury, cause the same to be paid to the ap-"plicant."

"This section limits no time within which applica-"tion must be made for the proceeds of the sale. The "Secretary of the Treasury was not authorized to fix "such a limit. It was his duty, whenever the owner "of the land or his legal representatives should apply "for the money, to draw a warrant therefor without

" regard to the period which had elapsed since the sale. " The fact that six or any other number of years had " passed did not authorize him to refuse payment. " *The person* ENTITLED TO THE MONEY *could allow it to* " *remain in the Treasury for an indefinite period with-* " *out losing his right to demand and receive it.* It " follows that if he was not required to *demand it* " within six years, he was not required to *sue for it* " within that time."

" *A construction consistent with* GOOD FAITH *on the* " *part of the United States should be given to these* " *statutes.*" (*Nota bene.*) " It would certainly not be " fair dealing for the Government to say to the owner " that the surplus proceeds should be held in the " treasury for an indefinite period for his use or that " of his legal representatives, and then, upon suit " brought to recover them, to plead in bar that the " demand therefor had not been made within six " years."

" *The general rule is* that *when a trustee unequivocally* " *repudiates the trust* and *claims* to hold his own, *and* " *such repudiation and claim are brought to the knowl-* " *edge of the cestui-que-trust in such manner that he* " *is called upon to assert his rights,* the Statute of " Limitations will begin to run against him *from the* " *time such knowledge is brought home to him, and* NOT " BEFORE. *Merriam* v. *Hassan,* 14 Allen (Mass.), 516; " *Baker* v. *Whiting,* 3 Sumn., 486; *Kane* v. *Blood-* " *good,* 7 Johns. (N. Y.), Ch. 90; *Attorney General* v. " *Proprietors of the Meeting House in Federal Street* " *in Boston,* 3 Gray (Mass.); *Bright* v. *Segerton,* 2 De- " G., F. & J., 606; *Wedderburn* v. *Wedderburn,* 2 " Keen, 722."

" *In analogy to this* RULE the right of the owner of " the land to recover the money which the government " held for him as his trustee did not become a claim " on which suit could be brought, and such as was " cognizable by the Court of Claims, until demand " thereof had been made at the treasury. Upon such " demand the claim first accrued. As the suit was " brought within six years from the date of demand,

" it falls within the terms of the section giving juris-
" diction to the Court of Claims, and is not cut off by
" the lapse of time."

United States v. *Taylor*, 104 U. S., 221, 222.
Cited with approval in *U. S.* v. *Wardwell*,
172 U. S., 56.

" The contention of the appellant is, that if the title
" was conveyed as security, then the instruments cre-
" ated simply a mortgage; and that the rule in Cali-
" fornia, from which State Utah took its statues, is
" that when action on the *debt* is barred, action on the
" *mortgage* given to secure the debt is *also* barred. The
" obvious answer is that these instruments did not
" create a mortgage, *but an active and express trust*,
" *and the rule invoked as to mortgages does not apply*,
" *either in California* OR ELSWHERE. In *Miles* v. *Thorne*,
" 38 California, 335, it was held that the Statute of Limi-
" tations does not begin to run in the case of an express
" trust, *until the trustee, with the knowledge of the cestui*
" *que trust, has* DISAVOWED *and* REPUDIATED *the trust.* In
" *Hearst* v. *Pujol*, 44 California, 230, the proposition is
" laid down that 'if A conveys to B a tract of land,
"'to be by B afterwards reconveyed to himself, he
"'thereby creates an express trust, which B may ac-
"'cept by accepting the deed'; and also that 'the
"'statute of limitations does not commence running on
"'A's right to a reconveyance until B REPUDIATES
"'*the trust*, and such repudiation is brought to the
"'knowledge of A.' And *Grant* v. *Burr*, 54 Cali-
" fornia, 298, draws the *distinction* between a *deed of*
" *trust* and a mortgage, as to the running of the stat-
" ute of limitations. In that case, the trustee under a
" deed of trust, *long after the notes secured thereby had*
" *become barred by the statute of limitations*, was pro-
" ceeding to sell the land under the power conferred.
" The grantor in the deed sought to enjoin such sale,
" but the injunction was denied, and this ruling was
" affirmed by the Supreme Court. See also *Henry* v.
" *Mining Company*, 1 Nevada, 619; *Bacon* v. *Rives*,
" 106 U. S., 99; *Seymour* v. *Freer*, 8 Wall., 202, in

"which the general proposition is laid down *that the* "*statute of limitations has no application to an express* "*trust* where there is no disclaimer. In the case at "bar there was no disclaimer on the part of the trus- "tee, no repudiation of the trust. He never asserted "title in himself as against any beneficiary."

Gisborn *v.* Charter Oak Ins. Co., 142 U. S., 337, 338.

"As a general rule, doubtless, length of time is no "bar to *a trust clearly established*, and express trusts are "not within the statute of limitations, because the pos- "session of the trustee is presumed to be the posses- "sion of his *cestui que trust*. *Prevots* v. *Gratz*, 6 Wheat, "481, 497; *Lewis* v. *Hawkins*, 23 Wall., 119, 126; *Rail-* "*road Co.* v. Durant, 95 U. S., 576. But this rule is "* * * subject to *this* qualification, that time begins "to run against a trust *as soon as it is openly* DISAVOWED "*by the trustees, insisting upon an adverse right and* "*interest which is* CLEARLY *and* UNEQUIVOCALLY *made* "*known to the cestui que trust;* as when, for instance, "such transactions take place between the trustee and "the *cestui que trust* as would in cases of tenant in "common amount to an *ouster* of one of them by the "other."

Speidel v. *Henrici*, 120 U. S., 386.

In a very recent decision this learned Court applied the same principle to still another class of cases, recognized as analagous because presenting the essential feature of *the Government's having had deposited in the Treasury, pending final disposition of the same, sums of which it (the Government) had had occasion to take, or keep, possession and custody, provisionally, as a quasi-"trustee" for the person or persons who should become, or prove to be, entitled to receive the same.*

In the case referred to (*U. S.* v. *Wardwell*, 172 U. S., 48) the statutory provisions directing the "depositing" in the Treasury, *by the* TREASURER (*nota bene*) of amounts for which cheques, &c., have been made out, but which had remained *uncalled for* more than three

years, were held by this learned Court to establish such a relation between the Government and the parties entitled to such moneys, as must be put an end to by an open and *communicated* DISAVOWAL and *repudiation* by the Government, before the statute of limitations can begin to run.

" Section 1069, Revised Statutes," says Mr. Justice Brewer, speaking for the Court, " is not merely a stat-" ute of limitations but also jurisdictional in its nature. " * * * Counsel for the Government contend that " the claim against the United States first accrued in " 1869, when the cheques were issued, or, if not then, " at least in 1872, when they were lost or destroyed, " and, therefore, this being *twenty four* years before " the commencement of this suit, that the claim was " barred. *If there were nothing to be considered but* " *the single section referred to*, it would be difficult to " escape this conclusion of counsel."

" It is further contended that Sections 306, 307 and " 308 " (the provisions above referred to) " relate to " what is simply a matter of bookkeeping, and do not " in any manner change the scope of the liability of " the Government. *But we are of opinion that they* " *mean something more.* While it *may* be that they " do not provide for the creation of an express trust, " liability for which, according to general rules, con-" tinues until there is a direct repudiation thereof, YET " *they contain a promise by the Government to hold the* " *money thus covered into the treasury for the benefit of* " *the owner until such time as he shall call for it.* This " is a continuing promise, and one to which full force " and efficacy should be given" (p. 52).

" * * * The deposit by the Treasurer is not of a " gross amount to be applied to *any* claims that may " arise, but of the amount due for certain specified " cheques and drafts. In other words, the purpose " of the Government by this statute is to secure " to each party who holds (*unpresented*) Government " paper the amount thereof, to place it in " the Treasury to his credit, and to prescribe a " method by which whenever he wishes he can ob-

" tain it. *No time is mentioned within which he* " *must apply for a warrant or after which the money* " *is forfeited to the Government.* The ordinary rules " for the maturity of negotiable paper do not control. " Congress has directed that the money *already once* " *appropriated and chequed against*" (but uncalled for more than three years) "shall be placed in the " Treasury and held subject to the call of the party " for whose benefit it has been so appropriated and " chequed. *There is* NO OCCASION *for suit until after* " *his application for a warrant is refused.* When the " contract created by the promise made in Section " 308 is *broken, then* a claim for the breach of such " contract first accrues, then the limitation prescribed " by Section 1069 begins to run. There is thus no " conflict with that section, its full force is not im- " paired " (p. 53).

" *In this connection it may not be amiss to notice* " *those authorities in which it is held that upon the or-* " *dinary deposit of money with a bank no action will* " *lie until a demand has been made by cheques or* " *otherwise, and that hence the statute of limitations* " *will not begin to run until after a refusal to pay on* " *such demand*" (citing cases, p. 53).

" * * * The rule (as to bank deposits) finds sup- " port in the decisions of many courts of the highest " standing. *It is not inconsistent with the proposition* " *laid down by this Court* in *Marine Bank* v. *Fulton* " *Bank*, 2 Wall., 252, and often reaffirmed, *Phœnix* " *Bank* v. *Risley*, 111 U. S., 125, and cases cited in " opinion, to the effect that the relation between a " bank and its depositor is that of debtor and creditor " and nothing more, for *that proposition throws no* " *light upon the question* WHEN *the debt of the debtor* " *becomes* DUE *and when the statute of limitations* " *begins to run.* Neither is it pretended that the " relation of the United States was that of a bank and " depositor, *but the reasoning of the authorities cited* " *strengthens the conclusion that when Congress declared* " *that this money should be covered into the Treasury to* " *the credit of the plaintiff, and that she should, on pres-*

"*entation of the cheques to the proper officer of the Treas-*
"*ury, be entitled to a settlement of an account and the*
"*issue of a warrant; it was the intention to recognize a*
"CONTINUING OBLIGATION—one which was available to the
"plaintiff at any time she saw fit, that it was a promise
"which was not broken until after demand and re-
"fusal."

"*But authority more in point is not wanting to sus-*
"*tain these views.* The direct tax act of Aug. 5, 1861,
"c. 45, 12 Stat., 292, provided in the thirty-sixth sec-
"tion, that, in case of a sale of real estate, and a *sur-*
"*plus* remaining after satisfying the tax, costs, &c.,
"such surplus should be paid to the owner, or if he be
"not found, 'then such surplus shall be deposited in
"the Treasury of the United States, to be there held
"for the use of the owner, or his legal representative,
"until he or they shall make application therefor to
"the Secretary of the Treasury, who, upon such appli-
"cation, shall, by warrant on the Treasury, cause the
"same to be paid to the applicant.' In *United States*
"v. *Taylor*, 104 U. S., 216, the owner did not apply for
"the surplus until more than six years had elapsed from
"the closing up of the sale and the deposit of the
"money in the Treasury, and it was held that section
"1069 did not bar his action * * * This was re-
"affirmed in *United States* v. *Cooper*, 120 U. S., 124.
"Counsel distinguish those cases from this in that there
"the money *came* into the Treasury subject to an *ex-*
"*press* trust created by the act of Congress which
"*directed* that it be there held for the benefit of the
"owner, while here in the first instance there was a
"written promise by the Government, *a promise for*
"*which an appropriation had been made and upon*
"*which a cause of action existed.* But while there is a
"difference, we *do not think it* SUFFICIENT *to create a*
"*different rule or measure of liability.* There is *no*
"*new deposit* when a check is certified, but as shown
"by the opinion in *Girard Bank* v. *Bank of Penn*
"*Township, supra, this fact works no change in the*
"*rule.* Whether the money to satisfy this liability
"was *paid in by some third party* or *already held*

"*by the Treasurer;* whether there was or was "not any *prior* liability on the part of the "Government, in each case *there was a declaration by* "*Congress that the money thus received or covered into* "*the Treasury should there be held for the benefit of and* "*subject to the call of the owner, and no time was spe-* "*cified within which such call must be made.* THIS "was a distinct and separate promise, creating a new "liability, and the *claim* accrued when this new lia- "bility *matured.* It matured when the claimant pre- "sented her cheques and, calling for warrants, were "refused them."

United States v. *Wardell*, 172 U. S., 52, 55-58.

That in principle, the case now at bar is strictly analagous to those dealt with in the decisions cited, there would seem to be no room to doubt, especially when it is kept in mind that, as this learned Court declared in the *Taylor* case above cited, "*a construction consistent with* GOOD FAITH *on the part of the United States should be given to these statutes* (104 U. S., 221, *foot of page*).

The statutory direction to deposit in the Treasury the proceeds of prize property, "subject to *the order of the court in the particular case,*" can have had only one object and meaning—*i. e.*, that the moneys should be held in the custody of the Treasurer until paid out to *the parties whom the court's decree shall finally point out as the persons entitled.* The only alternative to this would involve the ridiculous assumption that the statute may have contemplated the Court's "ordering" any *other* disposition of the funds than payment to those found to be entitled. "*No time was limited*" *within which such payment, on the* "*court's order,*" *should be actually secured or demanded, or after which* "*the moneys in question would be forfeited to the Government.*"

If there is any difference in the equities, indeed, the advantage would seem to lie on the side of the innocent owner whose property was forcibly and unlawfully seized by the Government's war vessel, *sold* by

the U. S. Marshal (under most unfavorable conditions, of course) and the meagre "proceeds" so obtained *deposited in the Treasury under a "positive mandate" of Congress compelling this to be done.* Surely there is better consideration here for a "continuing promise" to such a despoiled owner, than there was in the case of *delinquent land owners* whose delinquency forced the Government to have the land *sold for taxes*, or even in the case of creditors *to whom cheques or warrants had been issued* but who had *for more than three years* neglected to *cash* the same (as they could have done in the ordinary course of business).

Respectfully, but earnestly, and with absolute frankness, we must PROTEST against the misguided official or personal zeal which would lightly place the Government of the United States in the attitude—CLEARLY NOT "*consistent with good faith*"—of *pleading the 'Statute of Limitations'* to escape, *under such circumstances*, the plain obligation TO PAY OUT *again* the *whole* of the "proceeds" which *by force* it procured the deposit of in its own Treasury, "subject to the order of the Court in the particular case." *That* Court and *this* Court condemned the seizure of the *Teresita* as unwarranted, and ordered restitution. The balance we now claim has *never been paid* under that order. The statute *gave no warning* that payment, under the Court's order, must be demanded *within any given time.* As a matter of fact, *until after 1882* we were receiving installments of the sum due us, and the Government had in no way signified any intention to repudiate its obligation. As this Court said in the opinions cited,—"there was *no occasion* for a suit." Within "six years" from the day when the Government stopped paying us, the suit was brought.

Is the United States really willing, for the sake of the petty sum involved, permanently to take the position imputed to it by the District Attorney?

As if to stamp as undeniable the analogies to which we appeal, this learned Court has spoken of the Government as holding prize property "IN TRUST *for those*

who, by the decree of the Court, may have the ultimate right to it."

Harlan v. *United States* ('*The Nassau*'), 4 Wall, 635.
Collins v. *The Florida*, 101 U. S., 37.

In any aspect of the case, the obligation with respect to the fund so "had and received" by the Government, had to be openly repudiated and disavowed, to the knowledge of the claimant, before the Statute of Limitation began to run.

III.

The objection made to the judgment of the Circuit Court (the reversal of which is now under review) on the ground that in computing the claimant's damages the Circuit Court took into consideration the length of time during which the wrongful withholding of the balance due continued, and so made the damages larger by an amount which it called "interest," may not be so certainly a sound objection, as the learned District Attorney seems to have deemed it in the Court below (the Court itself did not refer to it). But even assuming, for the sake of the argument, that the objection is really a sound one, and that the Circuit Court erred in computing into the sum allowed as damages the amount which it called "interest," the circumstances would not, in and of itself, require or justify the judgment of the Circuit Court of Appeals ordering "judgment in favor of" the United States. At the utmost, the recognition of the alleged error as to "interest" need (and should) have led only to a reduction of the amount of the judgment to the extent of the sum improperly allowed.

1. That the objection to the allowance of the so-called "interest" under the circumstances, may not be so *certainly* a *sound* objection, as it has been claimed to be, may perhaps sufficiently for the purpose of this argument, appear from the following considerations:

a. The necessary consent of Congress to the allowance of what in this case has been *called* "interest,"

may be given in the form of a statutory permission to recover "*damages*" from the United States.

"It has been established, as a general rule, in the "practice of the Government, that interest is not al- "lowed in claims against it. * * The only "*recognized* EXCEPTIONS are, where the Government "*stipulates* to pay interest and *where interest is given* "*expressly by an act of Congress*, EITHER *by the name* "*of interest* OR *by that of* DAMAGES."

Angarica v. *Bayard*, 127 U. S., 260.

Quoted with approval in

United States v. *North Carolina*, 136 U. S, 218.

In a still later case, this learned Court said:

"The entire sum for which the State (New York) "asked judgment was $131,188.02, of which $91,320.- "84 represented the amount *paid as* INTEREST *on* "*moneys borrowed* for the purpose of raising troops "for the national defence, and for the repayment of "which, with interest at seven per cent., the State "executed its short time bonds. The balance, $39,- "867.18, represented the amount paid as INTEREST on "moneys received by way of loan from the Canal "Fund and supplied by the State for the same pur- "pose. On behalf of the Government it is contended "that payment by the United States of the above sum "of $91,320.84 is prohibited both by the Statute, act "of March 3, 1863, c. 92, 12 Stat., 765, Revi. Stat., "§ 1091, providing that interest shall not be allowed "on any claim up to the time of the rendition of judg- "ment thereon by the Court of Claims, unless upon a "contract *stipulating* for the payment of interest, "and by the general rule based on grounds of public "convenience, that *interest* 'is not to be awarded "against a sovereign government, UNLESS *its* CONSENT "to pay interest has been manifested by an act of its "legislature, or by a lawful contract of its executive "officers.' *United States* v. *North Carolina*, 136 U.

" S., 211, 216; *Angarica* v. *Bayard*, 127, U. S., " 251, 260."

" *The allowance of the $91,320.84 would not contra-* " *vene either the statute or the general rule which we* " *have adverted.* * * * *Liberally interpreted*, it is " clear that the acts of July 27, 1861, and March 8, " 1862, created on the part of the United States, an " obligation to indemnify the States for *any* costs, " charges and expenses *properly incurred* for the pur- " poses expressed in the act of 1861, the title of which " shows that its object was 'to *indemnify* the States " for EXPENSES incurred by them in defense of the " United States.'"

" So that the only inquiry is *whether, within the fair* " *meaning of the latter act, the words* 'COSTS, CHARGES " *and* EXPENSES *properly incurred*,' included INTEREST " paid by the State of New York on moneys borrowed " for the purpose of raising, subsisting and supplying " troops to be employed in suppressing the rebellion. " *We have no hesitation in answering this question in* " *the affirmative.* * * * We cannot doubt that the " INTEREST paid by the State on its bonds, issued to " raise money for the purposes expressed by Congress, " constituted *a part of the* COSTS, CHARGES *and* EXPENSES " properly incurred by it for those objects. * * * " We are of opinion that the claim of the State for " money paid on account of interest to the Commis- " sioners of the Canal Fund, is not one against the " United States for INTEREST *as such*, but is a claim of " costs, charges and expenses properly incurred, * * * " and *is embraced by the act* of Congress declaring that " the States would be indemnified by the General " Government for moneys so expended."

United States v. *New York*, 160 U. S., 619, 621, 624.

b. The act of 1887, under which this proceeding was brought, may fairly be construed as consenting to the allowance of "interest," under the name of "*damages*":

The statute in question (24 Stats at Large, p. 505,

§ 1, Par. "First"), authorizes certain courts to adjudicate "CLAIMS * * * upon any contract, express or implied, * * * or for *damages*, liquidated or unliquidated, in cases not sounding in tort, *in respect of which claims the party could be entitled to* REDRESS against the United States * * * IF *the United States* WERE SUABLE."

Furthermore, though formulating *an elaborate and detailed revision or re-enactment* of the provisions of the Revised Statutes, on the subject of the prosecution of claims against the Government, and though expressly imposing certain other restrictions on the general jurisdiction granted, this statute nowhere adopts or repeats the prohibition of the former statutory system against the allowance of "interest" as an element of damages. (On the contrary, it may be deemed to have expressly *repealed* that prohibition, by the general repeal contained in § 16.) NOR does the *revised* "CLAIMS" SYSTEM in question anywhere intimate that the "damages," or the "redress" which it authorizes is to be *of any other quality or extent or degree* than the "damages" or "redress" obtainable in a similar case against a "suable" defendant. *The* OBVIOUS *suggestion* of the language in which the jurisdiction is conceded, certainly is that the purpose of the enactment was simply *to* WAIVE *the Government's* PRIVILEGE *as a* NON-"*suable*" *sovereign*. A permission, by such a privileged entity, to its own tribunals, to "*hear and determine* CLAIMS" to "damages" or "redress" "in "respect of which claims the party would be entitled to "redress against the United States *if the United States* WERE SUABLE," surely contemplates the allowance of THE "damages" or "redress" which would in a like case be allowed against a "suable"—*i. e.*, an unprivileged defendant. In any case, therefore, in which so-called "interest" is an essential element or factor in the computation of the "damages," or the measuring of the "redress," this statute must (we submit), if fairly construed, be deemed an "*express* giving of interest *by the name of damage*."

In the case of *United States* v. *McKee*, decided in

1875, this Court found a sufficient permission to allow 'interest,' in a statute directing the consideration of the claim to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases." The description, in the present statute, of the claims to be adjudicated, as "claims in respect of which the party would be entitled to redress if the United States were suable," at least as cogently implies that the "redress" to be allowed is *the* redress to which the party would be entitled *in the case referred to—i. e.*, the case of a "suable" *non*-"sovereign" defendant.

U. S. v. *McKee*, 91 U. S., 450, 451.

2. But even assuming, for the sake of the argument, that the objection is really a sound one, and that the Circuit Court erred in *computing into the sum allowed as "damages"* the amount which it called "interest," this circumstance would not, in and of itself, require or justify the judgment of the Circuit Court of Appeals ordering *"judgment in favor of" the United States.* At the utmost, the recognition of the alleged error as to "interest" need (and should) have led only to a reduction of the amount of the judgment to the extent of the sum improperly allowed.

IV.

The judgment under review should be reversed, and judgment ordered for the claimant, in accordance with the decision of the Circuit Court.

COUDERT BROTHERS,
Attorneys for Petitioner.

FREDERIC R. COUDERT, JR.,
CHAS. FREDERIC ADAMS,
Of Counsel.

No. 15.

Brief of Atty. Gen. (Pratt) for U.

Filed Oct. 14, 1879

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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

CHARLES UHLHORN, AS ANCILLARY executor of the last will and testament of Raphael Madrazo, deceased, plaintiff in error,
v.
THE UNITED STATES.

No. 15.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRATT,
Assistant Attorney-General.

In the Supreme Court of the United States.

CHARLES COUDERT, AS ANCILLARY executor of the last will and testament of Raphael Madrazo, deceased, plaintiff in error,
v.
THE UNITED STATES.

No. 15.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The substantial facts set forth in the Findings of Fact herein are these:

Pending the proceedings in the district court of the United States which followed the seizure of the vessel of the decedent as an alleged blockade runner and in obedience to the order of that court, the United States marshal sold the vessel and her cargo and, pursuant to a regulation of the Treasury Department then in force, deposited the net proceeds of such sale, amounting to $10,359.20, in a national bank, which was a special or designated depository of public moneys of the United States, to await the further order of the court.

In the said proceedings the district court pronounced the seizure unlawful and decreed restitution to the decedent, by virtue of which he became entitled to receive said deposit, as representing and standing in the place of the said vessel and her cargo.

That decree was affirmed on appeal by this court and its mandate issued to carry the same into effect, by force of which the decedent again became entitled to receive the said deposit; but owing to the insolvency of the bank in which said deposit had been made, occurring pending said appeal, the bank was unable to return said deposit, and thus refused to comply with the said judgment or decree of restitution.

A receiver was duly appointed for the bank who thereafter declared several dividends upon the deposits of the bank at the time of its insolvency and failure, including the said deposit of the proceeds of the sale of the said vessel and cargo, and who paid upon account of such proceeds to the decedent, or his personal representative after his death, in various amounts, from May 1, 1871, to September 28, 1882, the sum of $8,183.77, leaving a balance of $2,175.43, no part of which the said receiver was thereafter able to pay.

And claim is made in this action for the above balance, with interest on the same from the date of the last payment made by the receiver of the insolvent bank, as above set forth.

Judgment was rendered for the claimant for the entire claim in the circuit court, but this judgment was reversed by the circuit court of appeals.

ARGUMENT.

The claimant contends, upon the foregoing facts, that the proceeds of the sale of the vessel and cargo of the decedent were held in the Treasury of the United States in trust for the claimant, and that the United States is therefore liable to the claimant for the unpaid balance of said proceeds with interest as an incident.

The court below disposed of this contention by holding that the proceeds of said sale were not deposited in the Treasury of the United States and that the Government was not responsible for its diminution, pointing out in this connection that the vessel and her cargo were sold by order of the district court and that the proceeds of such sale remained subject to the order of the court in lieu of the vessel and cargo.

In so holding the court planted itself squarely upon the decision of this court in *Branch* v. *United States.* (100 U. S., 673.)

Counsel for claimant insist, however, that the Branch Case is not analogous to this; but the distinction made by them would seem to be in matters of detail only, the essential facts remaining the same in both cases.

In both cases the property of claimant was seized by the United States and made the subject of condemnation proceedings; in both the property seized was sold by order of the court in which those proceedings were had, and deposited in a bank which was a special depository of the United States to await the order of the court; in both the depository failed pending the proceedings and

was unable to pay the full amount of the deposit. Upon this state of facts this court held in the Branch Case (*supra*):

> In this case the money deposited belonged for the time being to the court and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depository, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong.

It may be that, as earnestly contended by counsel for claimant, it was the duty of the marshal who sold the vessel under consideration to deposit the proceeds in the Treasury of the United States, but it does not appear from the Findings of Fact in this case that such was his action. And the Findings of Fact must govern.

Moreover, if any trust relation toward the claimant was assumed by the United States with respect to this deposit, the proof of such relation must be looked for in the facts and circumstances surrounding the deposit, and especially the acts of the parties in this connection, for there was clearly no express trust created, nor assumed by the United States. But these facts and circumstances indicate that the deposit made was regarded in the light of "money belonging for the time being to the court and held as a trust fund pending the litigation," precisely as in the Branch Case.

Turning to the Findings of Fact, it appears that while the appeal to this court in the case of the *Teresita* was pending, the bank in which the deposit of the proceeds of the sale had been made became insolvent and was placed in the hands of a receiver. As a result, after the mandate of this court had been issued to carry into effect the decree of restitution made by the district court, by force whereof the decedent became again entitled to receive the said deposit, owing to the insolvency and pending litigation the said bank was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution. This was some time prior to December, 1866. Thereafter, beginning May 1, 1871, and ending September 28, 1882, the receiver of the bank paid to the claimant and to his representatives, after his death, various sums on account of this deposit, amounting to $8,133.77. (Findings 5, 6, and 7.)

It is fair to presume that these payments were so made upon the filing with the receiver, by the claimant, of his claim against the bank for the amount of the deposit *as one of the creditors of the bank.* At all events his acts with reference to this deposit during all that period of sixteen years are consistent only with the theory that he regarded the bank and not the United States as his debtor for the amount of the deposit and are essentially inconsistent with his present claim that the bank held this deposit as the agent of the United States in trust for his benefit. For in that event it is clear that he was entitled to payment in full of the amount of the deposit immediately upon the issuing of

the mandate of this court above referred to—a right which he would most assuredly have taken steps to speedily assert and enforce, rather than to await for years the uncertain results of the liquidation of the affairs of an insolvent bank.

That he did not then nor seasonably thereafter assert his claim against the United States (delaying such action until 1888), but only against the bank, treating the bank and not the United States as his debtor, ought to be sufficient to conclusively determine that the deposit was made precisely as defined in the Branch Case and to estop the claimant in his present claim.

At all events, these facts contain a complete answer to the eloquent and oft-repeated periods of counsel on the subject of "good faith." It must be remembered that the United States has not profited in this matter at the expense of the claimant, and if it must now pay the amount demanded by the claimant it must be at its own loss. But this loss will be fairly attributable to the action of the claimant.

If the claimant had seasonably asserted and succeeded in enforcing his claim against the United States after the bank had refused payment to him, it would have thereby been established that the bank held this deposit as the financial agent of the United States and not as the depository of the court, and the Government would then doubtless have been in a position to have collected from the bank, as a preferred creditor, or from its bondsmen, the full amount of the deposit. But the claimant permitted the affairs of the bank to be wound up and sixteen or, more accurately, twenty-two years to elapse before

giving any intimation that he looked to the United States and not to the bank for payment.

The imputation of bad faith may unquestionably be fairly made in this case, but not against the United States.

THE STATUTE OF LIMITATIONS.

If the court shall find that the distinction sought to be made by claimant between the facts in the Branch Case and in this is substantial, and that the deposit made by the marshal was in effect in the Treasury of the United States, and was thus held in trust by the United States, then the law relating to trust funds undoubtedly became applicable to this fund as urged by the claimant and there remains on behalf of the United States only the inquiry as to when, if at all, this trust was disavowed.

The answer to this inquiry is to be found, it seems to me, in the Findings of Fact.

As already cited, after the claimant became finally entitled to receive the deposit made in the bank on the mandate of this court, "owing to the insolvency and pending litigation, the said bank was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution."

This refusal to comply with the decree of restitution of the court was a disavowal of the trust on the part of the United States sufficient to give the claimant a right of action against the United States, for the contention of the claimant is that the bank was the agent of the United States—in effect its Treasury—holding the deposit in trust for the benefit of the claimant. Hence when the bank refused, for whatever reason, to

comply with the order of the court by paying the deposit to the claimant, its refusal became the act of the United States.

Up to the time of this refusal he had no occasion to sue, but the refusal gave him the right to sue and, by the same token, the statute of limitations began then to run against that right and had barred it at the time this action was commenced. (*United States* v. *Wardwell*, 172 U. S., 53.)

AS TO INTEREST.

I can scarcely regard as serious the argument attempted by counsel for claimant to sustain his claim for interest in this action. Counsel are acquainted with and correctly state the law upon the subject on page 27 of their brief. I fail to see that they have brought their claim within any of the recognized *exceptions* to the rule cited by them from the decisions of this court.

As for the argument that the "Tucker Act" amounts to a repeal of the "former statutory system against the allowance of interest as an element of damages" (whatever that may mean), it seems too fanciful for consideration.

The claimant demands payment from the United States of the unpaid balance of an alleged trust fund held for his benefit by the United States, and also of interest, pure and simple, upon this unpaid balance. It may be that he is entitled to the principal sum claimed, but interest he certainly can not have.

LOUIS A. PRADT,
Assistant Attorney-General.

COUDERT, Administrator, *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 15. Argued October 10, 1899. — Decided November 20, 1899.

Money derived from the sale of a vessel captured in 1863 as a blockade runner, which, pending proceedings in court for condemnation and forfeiture, was deposited by the marshal to await the further order of the court in a national bank which was a special or designated depositary of public moneys, and which deposit was in part lost by reason of the failure of the bank, is not public money of the United States which may be recovered from it under the act of March 3, 1887, c. 359, 24 Stat. 505, generally known as the Tucker Act.

THE statement of the case will be found in the opinion.

Mr. Frederic R. Coudert, Jr., for plaintiff in error. *Mr. Charles Frederic Adams* was on his brief.

Mr. Assistant Attorney General Pradt for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff bases his right of action on the act of March 3, 1887, c. 359, known as the Tucker Act, 24 Stat. 505, and the following facts:

In November, 1863, the United States vessel Granite City seized the Spanish bark Teresita, the property of Raphael Madrazo, in the Gulf of Mexico as a blockade runner. Proceedings were instituted for her condemnation and forfeiture in the District Court for the Eastern District of Louisiana. By order of the court, dated August 23, 1864, she and her cargo were sold by the United States marshal, and the proceeds of the sale, amounting to the sum of $10,359.20, after deducting costs and other charges, were deposited by the marshal in the First National Bank of New Orleans, a special or designated depositary of public moneys of the United States,

to await the further order of the court. Judgment was subsequently rendered in favor of the claimant against the United States, from which the latter appealed to the Supreme Court, obtaining a supersedeas pending the appeal. The judgment was affirmed and restitution of the vessel and cargo directed. *The Teresita*, 5 Wall. 180.

Pending the appeal to the Supreme Court, the bank failed, and a receiver was duly appointed of its assets. In liquidating its affairs the receiver paid Madrazo during his lifetime, and to his representatives after his death, dividends amounting in all to $8183.87, the first payment May 1, 1871, the last on September 28, 1882. Madrazo died in Cuba on the 14th of April, 1877, and on the 20th of September, 1888, ancillary letters of administration were issued in the county of New York to the plaintiff in error.

After the payment of September 28, 1882, the receiver had no further funds applicable to the claim. This action was brought September 24, 1888, for the sum of $2175.43, the balance of the proceeds of the sale after deducting the payments made by the receiver.

The Circuit Court rendered judgment for the plaintiff for the amount claimed with interest from September 28, 1882. The Circuit Court of Appeals reversed the judgment, 38 U. S. App. 515, and the case was brought here.

The contention of plaintiff in error is that the deposit of the proceeds of the sale of the Teresita in the First National Bank of New Orleans, then a depositary of the public moneys of the United States, was a payment into the Treasury of the United States, and hence a receipt thereof by the United States, and, "consequently, a sum of money equal to the whole of such net proceeds must be held to have become payable to the claimant by the United States under the decree of restitution wholly irrespective of any loss of particular assets of the Treasury through the failure of the bank."

A similar contention was made upon facts very much the same in *Branch* v. *United States*, 100 U. S. 673. In that case certain cotton was seized under the Confiscation Act and sold during the progress of a suit for its condemnation by order of

the court, and the proceeds deposited by the clerk to await the further order of the court in the First National Bank of Selma, Alabama, upon a notification of the Secretary of the Interior that such bank had been designated by the Secretary of the Treasury as a depositary of public money. The suit was dismissed and judgment entered in favor of the defendants for costs. Pending the suit the bank failed, and in the proceedings for winding up its affairs a dividend upon the deposit was paid to the court, and then by order paid over to the claimants. A suit was brought against the United States for the balance of the original deposit upon the ground that the Selma bank was at the time of the deposit a designated depositary of public money and was part of the Treasury of the United States, and that consequently a deposit in it was a payment into the Treasury of the United States, binding the latter to its return if the decision of the court should be against condemnation. To the contention the court answered by Chief Justice Waite: "The position assumed by the appellants is to our minds wholly untenable. The designated depositaries are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the Government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depositary. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depositary, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong."

But that case is claimed to be distinguished from the pending one because the Confiscation Act, under which the *Branch case* was decided, contained no provision for the deposit in the Treasury, *pendente lite*, of the proceeds of property seized but *not yet finally condemned.*

In other words, the argument is that there was no provision in the Confiscation Act which required a deposit of the proceeds of the sale of property seized, and hence the deposit was the personal act of the officer, neither directed nor authorized by law, and did not charge the United States with responsibility, but that in the pending case, in pursuance of law, the deposit was virtually in the Treasury of the United States and became the property of the United States — "assets of the Treasury" — and subject, as public moneys are subject, to the use of the United States, and that the relation of debtor and creditor was created between the owner of the property sold and the United States.

The argument concedes, and necessarily, that there must have been authority or requirement of law for the deposit in this case. Was there such authority or requirement? It is claimed to have been contained in certain statutes of the United States which enabled the Secretary of the Treasury to designate national banks as public depositaries and by the acts of March 3, 1863, 12 Stat. 759, c. 86, and June 30, 1864, c. 174, 13 Stat. 308.

The latter acts respectively provided, with some difference of expression and detail, that "prize property" may be ordered sold by the court *pendente lite*, and upon any sale it shall be the duty of the marshal "forthwith to deposit the gross proceeds of the sale with the Assistant Treasurer of the United States nearest the place of sale, subject to the order of the court in the particular case." This direction of the statutes was not complied with. Its practical and legal alternative, it is contended, was complied with by a deposit of the proceeds of the sale of the Teresita in the New Orleans bank, then a public depositary, which by such designation became the Treasury of the United States.

It is impracticable to quote all the provisions of law in regard to the deposit, keeping and disbursement of the moneys of the United States. They will be found with a reference to the statutes of which they are the reproduction in the Revised Statutes of the United States, Title XL, Public Moneys. It is sufficient to say that places of deposit of the public moneys

are provided, and the duty of the officers who receive and disburse them. From these provisions it will be seen that the public moneys of the United States are the revenues of the United States from all sources, and the gross amount received must first be paid into the Treasury. (Secs. 3617 and 3618.) They are then subject to the draft of the Treasurer of the United States drawn agreeably to appropriations made by law. (Secs. 3593 and 3642. See also sec. 3210.)

From this summary we may more clearly understand the particular provisions of law which were applicable to public depositaries at the time of the deposit in this case. They were contained in the act of March 3, 1857, c. 114, 11 Stat. 249, § 3621, Rev. Stat., and in section 45 of the General Banking Act of June 3, 1864, c. 106, 13 Stat. 99, 113; § 3620, Rev. Stat.

The first act provided that "every disbursing officer or agent of the United States having any *money of the United States* intrusted to him for disbursement shall be and is hereby required to deposit the same with the Treasurer of the United States or with some one of the Assistant Treasurers or public depositaries, and draw for the same only in favor of the persons to whom payment is to be made in pursuance of law and instructions; except when payments are to be made in sums under twenty dollars, in which case such disbursing agent may check in his own name, stating that it is to pay small claims."

The second act provided that "all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. And the Secretary of the Treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their

duties as financial agents of the government; Provided, that every association which shall be selected and designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the government for internal revenue or for loans or stocks."

It was also provided by the act of August 6, 1846, sec. 3616, Rev. Stat., "All marshals, district attorneys and other persons than those mentioned in the preceding section, having public money to pay to the United States, may pay the same to any depositary constituted by or in pursuance of law which may be designated by the Secretary of the Treasury."

It is obvious from these provisions that it was only *public money* of the United States of which national banks could be made depositaries, and it was therefore only *public money* which an officer could deposit in them, whether he received it originally or received it to disburse. This is the ruling in the *Branch case*, and it is clearly applicable to the case at bar. By the seizure of the Teresita the title to her did not change nor the title to the proceeds of her sale, *pendente lite*. That awaited adjudication, and whatever relations to such proceeds or responsibility for them the United States might have assumed if they had been deposited with an Assistant Treasurer, they did not become public money and subject to the statutes applicable to public money, and authorized to be deposited in a public depositary.

It is not without significance that when Congress authorized "moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court," to be deposited with a designated depositary, it required it to be done "in the name and to the credit of such court," and not to the credit of the United States. Act of March 24, 1871, c. 2, 17 Stat. 1.

Judgment affirmed.

NOTE. — This case stood on the docket in the name of Charles Coudert as ancillary executor. Just before it was reached for argument, his death was suggested, and the appearance of Paul Fuller as administrator was entered.